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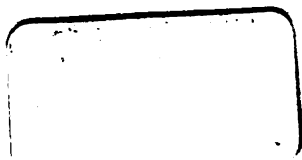
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REPORT OF CASES

July 3

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

TERRITORY OF ARIZONA

FROM

APRIL 16, 1898, TO DECEMBER 31, 1899

0

E. W. LEWIS
REPORTER

VOLUME SIX

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BANCROFT-WHITNEY COMPANY

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SUPREME COURT.

1898-1899.

WEBSTER STREET, Chief Justice.

GEORGE R. DAVIS, Associate Justice.

FLETCHER M. DOAN, Associate Justice.

RICHARD E. SLOAN, Associate Justice.

OFFICERS OF THE COURT.

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WILLIAM M. GRIFFITHSU. S. Marshal
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ANGIE B. PARKERDeputy Clerk³

¹ Resigned August 12, 1898.

² Appointed August 12, 1898.

³ Appointed October 23, 1899.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1898.

[Civil No. 590. Filed April 16, 1898.]

[52 Pac. 771.]

**A. BARRY, Plaintiff and Appellant, v. E. B. KIRKLAND
et al., Defendants and Appellees.**

- 1. NEGOTIABLE INSTRUMENTS—FORGERY—PROMISE TO PAY—ESTOPPEL—**
ADOPTION.—Where parties had formerly been sureties upon a note of Kirkland, and, to secure an extension of the indebtedness, Kirkland gave the payee a new note, to which he had forged the names of the sureties, they will not be estopped to deny the genuineness of their signatures to the new note by having, in ignorance of the facts, after the maturity of the note and without consideration, promised to pay it. Nor do such promises constitute an adoption of the forgeries.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. **A. C. Baker, Judge. Affirmed.**

The facts are stated in the opinion.

L. H. Chalmers, for Appellant.

The defendants, if not liable as signers, are liable, first, as having ratified and adopted the forgery (*Woodruff v. Munroe*, 33 Md. 158; *Casco Bank v. Keene*, 53 Md. 104; *Bank v. Crafts*, 4 Allen, 447; *Dow v. Ferry*, 29 Mo. 390; *Crout v. De Wolf*, 1 R. I. 393); and second, by their acts subsequent to the forgery they are estopped from denying the genuineness of their signatures. Daniel on Negotiable Instruments, secs. 859, 1354.

Joseph Campbell, for Appellees.

When the term "ratify" is used in connection with a contract, it is only applicable to a contract made by a party acting, or assuming to act, for another. There must be some relation, actual or assumed, of principal and agent. *Ellison v. Jackson Water Co.*, 12 Cal. 542; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902; *Mitchell v. Minnesota F. I. Co.*, 48 Minn. 278, 51 N. W. Rep. 608.

E. B. Kirkland in signing the names of Loring and R. F. Kirkland to the note did not assume to act as their agent in so doing. He pretended to Barry that they themselves signed said note. He uttered the note as the act of these appellees by themselves, and not through him.

Before it can be contended that a principal has ratified the unauthorized act of his agent it must be shown that he was made acquainted with all the material facts. *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. Rep. 572.

"The principal is under no obligation to accept the assumed agent's acts. The law imposes no duties upon him to make inquiries about it. Where there is no legal obligation the question of negligence or diligence is of no importance. The duty of making inquiry and ascertaining what has been done is not cast on the one who is under no legal obligation to take on himself the responsibility, but it rests with the party who would gain a benefit by the enforcement of the contract. *Smith v. Lynch*, 7 Colo. App. 383, 43 Pac. 674.

Even if defendants did promise to pay the note they are not bound, and appellant cannot recover. *Owsley v. Phillips*, 78 Ky. 517, 39 Am. Rep. 258; *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702; *McHugh v. County of Schuylkill*, 67 Pa. St. 391, 5 Am. Rep. 445; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Garnett v. Ratliff*, 83 Ky. 384; *Smith v. Trammel*, 68 Iowa, 488, 27 N. W. 471; *Terry v. Taylor*, 33 Mo. 323; *Henry v. Heeb*, 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606; *First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952; *Wilson v. Hayes*, 40 Minn. 511, 12 Am. St. Rep. 754, 42 N. W. 467.

DAVIS, J.—This was an action brought by the plaintiff to recover against the defendants, E. B. Kirkland, R. F. Kirk-

land, and George E. Loring, upon a promissory note. The defendant E. B. Kirkland made default, and the defendants R. F. Kirkland and George E. Loring answered under oath, denying the execution of the note. The cause was tried without a jury, and the findings of the court were, that the defendants R. F. Kirkland and George E. Loring did not sign the note; that the placing of their names thereon was not done by their authority, knowledge, or consent, but that their names were forged thereto. The court further found that the oral promises of R. F. Kirkland and George E. Loring to pay said note were made under the misapprehension that they had originally signed said note; that at the times when said promises were made said note was not exhibited to either of them by the plaintiff, and that they were made without knowledge of the material facts in relation to said note; that said promises were made without any consideration whatever and after the maturity of the note; that by reason of said promises the plaintiff was in no way affected or injured, or induced to change his relations regarding said note; and that, as a conclusion of law, neither of said answering defendants were liable for the payment thereof. Judgment was entered accordingly in their favor. From the judgment and the order overruling his motion for a new trial, the plaintiff has appealed.

Under the pleadings and findings of the court below it may be assumed that the names of R. F. Kirkland and George E. Loring appearing upon said note were forgeries, as there is abundant evidence, we think, to support this conclusion. But it is claimed by the appellant that the two defendants by their acts subsequent to the forgery, if forgery it was, are estopped from denying the genuineness of their signatures, and that they are liable as having adopted the forgery. The evidence in the case shows that the defendants E. B. Kirkland and R. F. Kirkland were brothers, and that the defendant George E. Loring was their acquaintance and associate of eighteen or twenty years; that R. F. Kirkland and Loring had each previously been jointly obligated with E. B. Kirkland; that on May 1, 1891, the latter was indebted to the appellant in the sum of eight hundred dollars on a certain former note given by him, upon which Loring was liable as surety; that appellant delivered to E. B. Kirkland a new note in

blank for the renewal of the former obligation, and on the following day the latter returned the new note to the appellant, with his own and the names of George E. Loring and R. F. Kirkland signed thereto, and this is the note which was sued on. The appellant claimed to have had various conversations with R. F. Kirkland and Loring about the note, and that they had promised to pay it, but he did not testify that he had ever exhibited the instrument to either of them. The defendant R. F. Kirkland admitted in his testimony that he had on several occasions promised to pay the note, but claimed that he had done so under the mistaken assumption that he had really signed it. It plainly appears, too, that whatever promises were made by either R. F. Kirkland or Loring were made after the maturity of the note, and without any consideration. It is not shown that the appellant was in any way prejudiced by them, or that they induced him to do or omit to do anything whatever to his disadvantage, or that his *status* by reason thereof was in any respect changed. Under these circumstances, no foundation for an estoppel exists. 1 Daniel on Negotiable Instruments, sec. 859; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Moore v. Robinson*, 62 Ala. 537; *Crossan v. May*, 68 Ind. 242. If it be contended that without regard to the principle of estoppel the defendants are liable, as having adopted the forgery, the authorities cited by appellant will not sustain his contention under the facts in this case, as a short review of the former will readily disclose. In *Woodruff v. Munroe*, 33 Md. 147, it was held: "If, in an action against an indorser of a promissory note by the *bona fide* holders thereof, it be shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note and its transfer to plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a *bona fide* holder. But any admissions by the defendant made subsequently to the maturity of the note would not be evidence that he had authorized the indorsement of his name thereon." *Bank v. Keene*, 53 Me. 103, is a case where, on account of the defendant's admission of the genuineness of the signature, the bank refrained from proceeding against the person from whom it received the note, and the court held the defendant

thereby estopped from denying his signature. In *Greenfield Bank v. Crafts*, 4 Allen, 447, the court was considering the case of a party acting with full knowledge of the manner in which the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopted the signature, and assumed the note as his own. *Dow v. Spenny*, 29 Mo. 390, went on the proposition that the lower court erred in charging the jury that the plaintiff must prove that the signatures of the defendants on the note were their genuine signatures. In *Crout v. De Wolf*, 1 R. I. 393, the third clause of the *syllabus* is, "Where the person whose signature is forged promises the forger to pay the note, this amounts to ratification of the signature, and binds him." But an examination of the case shows that evidence was offered to prove that the plaintiff had bought the paper in consequence of what the defendant said to him, and the court charged that if, before purchasing the note, plaintiff asked defendant if he should buy and was told he might, defendant could not excuse himself on the ground of forgery. So that the case may be put upon the ground of estoppel. In *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 702, it was held that a promise, by one whose indorsement on a note is forged, to pay the same is void as against public policy. This is the entire line of authorities cited by counsel for appellant, and it will be seen that, in so far as they are applicable to the case at bar, they support, rather than impugn, the holding of the lower court. There are numerous authorities which hold that a forgery cannot be ratified. *Brooke v. Hook* is an English case reprinted in 3 Alb. L. J. 255. This was a case where the defendant's name was forged, and he had given a written memorandum that he would be responsible for the bill. Chief Baron Kelly places his opinion upon the grounds—1. That the defendant's agreement to treat the note as his own was in consideration that plaintiff would not prosecute the forger; and 2. That there was no ratification as to the act done, the signature to the note being illegal and void, and, though a voidable act may be ratified, it is otherwise when the act is originally, and in its inception, void. The opinion fully recognizes the proposition that when acts or admissions alter the condition of the holder of the paper the party is estopped, but it is necessary

that such a case be made. In *McHugh v. Schuylkill County*, 67 Pa. St. 391, 5 Am. Rep. 445, the defense to a bond was forgery. The court below charged that if the obligor subsequently approved and acquiesced in the forgery or ratified it the bond was binding on him. It was held that, there being no new consideration, the instruction was error; also, that a contract infected with fraud was void, not voidable, and confirmation without a new consideration was *nudum pactum*. This proposition is recognized in 2 Daniel on Negotiable Instruments, sec. 1352: "When no principle of estoppel applies, and when, through mistake, a party states that his signature is genuine, and afterwards, discovering his error, corrects it before the holder has changed his relations to the paper, or any one has dealt with it upon the faith of his admissions, we know of no principle of law which prevents the forgery from being pleaded." Upon the principles laid down in these authorities, we cannot see how any mere promise to pay a forged note can lay the foundation for liability of the appellees, when there appear no circumstances to create an estoppel, and the promises were made after maturity, without consideration, and without full knowledge of the material facts in relation to said note. Finding no error in the record, the judgment is affirmed.

Street, C. J., Doan, J., and Sloan, J., concur.

[Civil No. 585. Filed April 16, 1898.]

[52 Pac. 775.]

DAVID BABBITT, Defendant and Appellant, v. NEILL B. FIELD et al., Plaintiffs and Appellees.

1. MORTGAGES—FORECLOSURE — JUDGMENT — IN VACATION — VOID. — A judgment of foreclosure entered in vacation by a judge is not merely voidable but void, as, under the Organic Act and the statutes of the territory, the court, and not the judge, has jurisdiction to foreclose mortgages.
2. SAME—SAME—PLEADING—ABATEMENT—JUNIOR MORTGAGOR—FORMER FORECLOSURE TO WHICH HE WAS NOT A PARTY.—A junior mortgagor not a party to former foreclosure cannot plead a judgment of foreclosure therein in abatement of a subsequent suit in which he is made party defendant to foreclose the same mortgage.

3. CORPORATION—FOREIGN—CARRYING ON BUSINESS—SINGLE TRANSACTION—REV. STATS. ARIZ., TIT. 12, CHAP. 7, CONSTRUED.—The doing of a single act of business within the territory of Arizona by a foreign corporation not incorporated for the purpose of carrying on business in this territory does not constitute the carrying on of business within the meaning of the statute, *supra*, providing that every act done by a foreign corporation, incorporated for the purpose of engaging in or carrying on business within this territory, prior to compliance with requirements as to filing its articles, etc., shall be void.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

Edward M. Doe, for Appellant.

It is alleged in the third and fourth defenses of appellant's answer that the New Mexico Savings Bank and Trust Company is a foreign corporation, organized for the purpose among others of "engaging in and carrying on the enterprise, business, pursuit, and occupation of loaning money in and acquiring, holding, and disposing of property within the territory of Arizona, and also of taking security upon real property within said territory for its said loans. That ever since, and at all times since, its said organization the said corporation has been engaged in the general carrying on of said enterprise, business, pursuit, and occupation of loaning money, and taking security therefor by trust-deeds and otherwise, upon real property in the several counties of the territory of Arizona, and of acquiring property therein by foreclosure and otherwise, and that the contract sought to be enforced in this action was made in this territory." This is an allegation that the corporation, the real party in interest, being a foreign corporation, has failed to comply with the requirements of our statutes in regard to foreign corporations.

As a state or territory has the power entirely to exclude from its limits a foreign corporation, so it has the power of prescribing the terms upon which alone it may be permitted to do business within its limits. *Home Ins. Co. v. Davis*, 29 Mich. 238; *Farmers etc. Ins. Co. v. Harrah*, 47 Ind. 236;

Attorney-General v. Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717; *State v. Lathrop*, 10 La. Ann. 398; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *In re Comstock*, 3 Saw. 218, Fed. Cas. No. 3078; *Semple v. Bank of British Columbia*, 5 Saw. 88, Fed. Cas. No. 12659; *Paul v. Virginia*, 8 Wall. 168; *Lafayette Ins. Co. v. French*, 18 How. 404; *Ducat v. Chicago*, 10 Wall. 410.

This class of statutes is not only constitutional but meritorious, in that they only require a foreign corporation as a condition precedent to doing business in the territory to submit itself to the jurisdiction of the territorial courts and place itself upon terms of contractual equality with the citizens with whom it does business. They only afford legitimate protection to the citizens of the territory, and the foreign corporation can at its option either refrain from doing business within the territory or comply with the simple and reasonable provisions of the statute.

If it enters the territory and violates the law, entering into contracts declared void by the provisions of the statute, it cannot be heard to complain of the enforcement of the rule that courts will not, upon the application of either party to an illegal or void contract, aid in its enforcement. Any of the defendants in this action may plead failure to comply with the statute. There can be no estoppel to prevent showing a violation of a statute to the prejudice of an innocent party. *Semple v. Bank*, 5 Saw. 90, Fed. Cas. No. 12659; *In re Comstock*, 3 Saw. 218, Fed. Cas. No. 3078; *Steadman v. Duhanell*, 1 C. B. 888; *Keen v. Colman*, 39 Pa. St. 299, 80 Am. Dec. 584; *Fairtitle v. Gilbert*, 2 Term Rep. 169; *Bank v. Owens*, 2 Pet. 538; *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699; *Coffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126; *Merriam v. Boston etc. R. R. Co.*, 117 Mass. 241.

Nearly all the states and territories have statutes somewhat analogous to ours. Some provide no penalty for non-compliance, and under such statutes the decisions are nearly unanimous to the effect that any one sued by a foreign corporation which has failed to comply with the statutory requirements may plead such failure as a valid defense to the action, upon the theory that there is no other method of enforcing the statute.

Plaintiffs claim that the decree is void because rendered

and entered in vacation, but the stipulation which was filed by the plaintiffs and acted upon by them dispenses with evidence, and as soon as filed left the case in the same position as though it had been submitted in term time after full trial of the issues.

And in such case, although the decree be entered in vacation, it is not absolutely void so that plaintiffs may ignore it and institute a new action. They must first cause the original decree to be set aside by appropriate proceedings. *Ex parte Bennett*, 44 Cal. 85.

Plaintiffs having been parties to and procured the decree in the original action, are estopped from alleging the invalidity of that decree. *Semple v. Wright*, 32 Cal. 659.

Herndon & Norris, for Appellees.

The judgment rendered in vacation was absolutely void. The court had no jurisdiction in the premises, and a stipulation for such a judgment cannot make it valid. *Fillee v. Cody*, 4 Colo. 109; *Francis v. Wells*, 4 Colo. 274; *Kirtley v. Marshall S. M. Co.*, 4 Colo. 111; *Schuster v. Rader*, 13 Colo. 329, 22 Pac. 505. "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action." Freeman on Judgments, sec. 118. Our Organic Act and the statutes of the territory grant the power to the *court*, and not to the *judge*, to foreclose mortgages. In the judgment pleaded as a bar by appellant, the court never acted, but the judge acted when the court was not in session, and without jurisdiction or authority. Therefore, such a judgment is no bar, no rights were acquired under it, but, on the contrary, the judgment and all subsequent proceedings thereunder were void. *Owen v. Howard*, 4 Ariz. 195, 35 Pac. 1057.

DAVIS, J.—This was an action commenced on August 18, 1896, to foreclose a trust-deed covering certain real property upon which the appellant claims to hold a mortgage subsequent in date. The trust-deed was made in the territory of Arizona by the defendants, J. F. Daggs and wife, to S. M. Folsom, as trustee for the New Mexico Savings Bank and Trust Company, and to secure a loan made by the said company to the said Daggs. The foreclosure suit was brought

by Neill B. Field, as receiver of the said company, and the said Folsom was also joined as a party plaintiff. The appellant answered separately, with six defenses, viz.: First, by plea in abatement that another action was pending between the same plaintiffs and the defendant mortgagors for the same cause, the first defense also setting up a subsequent mortgage from said Daggs and wife to appellant, but asking no affirmative relief thereon; second, by demurrer to complaint that the plaintiffs were not entitled to recover in the capacity in which they had respectively sued; third and fourth, that the contract could not be enforced because the New Mexico Savings Bank and Trust Company was a foreign corporation organized for the purpose, among others, "of engaging in and carrying on business . . . within the territory of Arizona"; that it had failed to comply with the requirements of chapter 7 of title 12 of the Revised Statutes, and that its acts in contracting the indebtedness sued for were void; fifth, that in a prior action (the action referred to in the plea of abatement in the first defense) for the foreclosure of the same deed of trust the plaintiffs had already obtained a decree of foreclosure, in pursuance of which there had been a sale of the property and at which they were the purchasers; sixth, that in the month of January, 1893, the said S. M. Folsom, president of the New Mexico Savings Bank and Trust Company, had entered into an agreement (not averred to be in writing) with the defendant J. F. Daggs, for and on behalf of said company, to release lot 7, in block 5, town of Flagstaff, from the lien and operation of said trust-deed, in consideration that Daggs would erect certain buildings on other parts of the property; that said Daggs performed his part of the agreement by the erection of said buildings, and thereafter sold and conveyed said lot No. 7 to the defendants M. V. and L. S. Drum, from whom, with knowledge of said agreement and relying thereon, the appellant had taken a mortgage upon said lot. The plaintiffs demurred to each of appellant's defenses and to his answer as a whole. The court overruled the appellant's demurrer, and sustained the demurrers of the plaintiffs. The appellant refusing to amend, judgment was entered in favor of the appellees, and the case is here on appeal from the said orders and judgment of the lower court.

The first proposition urged by the appellant for a reversal is based upon the court's ruling in sustaining the demurrer to his plea that another action was pending between the same parties, involving the same subject-matter; and there is also an assignment of error grounded upon the court's ruling in sustaining the demurrer to the fifth defense, setting up this alleged former suit and the decree rendered therein as a bar to the present action. Appended to the answer of appellant, and referred to therein as exhibits, are copies of the several parts of the record in the other proceeding. These show that, in vacation, on the fifth day of July, 1895, a complaint was filed by these appellees in the office of the clerk of the district court of Coconino County against the said defendants J. F. Daggs and wife for the foreclosure of the same deed of trust which is the subject of the litigation in the case at bar; that there was also filed at the same time an instrument of writing purporting to be an entry of appearance by said defendants and a stipulation for judgment; that while said court was at vacation a form of judgment and decree was entered therein over the following attestation: "Done in vacation, this 8th day of July, 1895. Jno. J. Hawkins, Judge of said District Court." It further appears that in pursuance of said pretended judgment and decree an order of sale was issued, under which the property described in said deed of trust was advertised by the sheriff, offered for sale, and declared sold to these appellees. It manifestly appears from the record as pleaded that the judgment and decree entered in the other proceeding are not voidable, but absolutely void. It was the decree of the judge, and not of the court, and no rights were either acquired or divested by it. Under the Organic Act and the statutes of the territory, the court, and not the judge, has jurisdiction to foreclose mortgages. The appellant was not a party to the other proceeding, could not have been affected by it, and was, we think, properly denied the right to plead it either in abatement or in bar of this action. The appellant alleges error in the court's ruling sustaining the demurrer to the third and fourth defenses of his answer. For the support of these defenses reliance is had upon the provisions of chapter 7 of title 12 of the Revised Statutes, which require every association, company, or corporation organized or incorporated under the laws of any other state, territory, or country, for

the purpose of engaging in or carrying on business within this territory, to file with the secretary of the territory and the county recorder of the county in which its business is located authenticated copies of its articles of incorporation, and the appointment of an agent upon whom notices and process may be served, and declares that every act done prior to compliance with these requirements shall be utterly void. A copy of the articles of incorporation of the New Mexico Savings Bank and Trust Company is attached to and made a part of appellant's answer. The articles show that the corporation was organized for the purpose of carrying on a banking business at Albuquerque, in the territory of New Mexico, and they fail to disclose any purpose of carrying on business in the territory of Arizona. The answer does not allege any place within the latter territory at which the corporation has undertaken or proposed to locate its business, but pleads a single act of business as transacted therein. So far as appears by the record, the company had no principal office or any place of business whatever in the territory of Arizona, and the making of the contract set out in the complaint was the only business ever done by it in the territory. The doing of a single act of business in the territory by a foreign corporation does not constitute the carrying on of business, within the reasonable construction of the provisions of the chapter relied upon. *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739. We do not find upon an examination of the several points raised by appellant in his brief that reversible error was committed by the trial court, and the judgment is therefore affirmed.

Street, C. J., Sloan, J., and Doan, J., concur.

[Civil No. 584. Filed April 16, 1898.]

[53 Pac. 187.]

APACHE COUNTY, Defendant and Appellant, v. JULIA BARTH, Executrix of the Will of Jacob Barth, Deceased, Plaintiff and Appellee.

1. COUNTIES—WARRANTS—PROPERLY EXECUTED PRIMA FACIE CAUSE OF ACTION—IMPEACHMENT—MERE DENIAL OF EXECUTION INSUFFICIENT TO OVERCOME PRESUMPTION OF LEGALITY.—County warrants, signed by the proper officers, are *prima facie* binding and legal. Such warrants make a *prima facie* cause of action. Impeachment must come from the defendant. A mere denial of their execution unsupported by any evidence is insufficient to overcome the presumption in favor of the legality of their issue.
2. SAME—SAME—PLEADING—ANSWER—DENIAL OF EXECUTION—VERIFICATION—EFFECT OF—REV. STATS. ARIZ. 1887, PAR. 735, CITED.—A denial of the execution of county warrants, verified (after plaintiff had made his case and rested) under paragraph 735, *supra*, does not necessitate the plaintiff's establishing by corroborative affirmative evidence the execution and issue of the warrants and the regularity and legality of the actions of the board of supervisors in so doing, but the effect and extent of the verification is to enable the defendant to disprove by affirmative evidence the execution of the warrants, or the regularity or legality of the proceedings on which their issue was based, and that the *prima facie* case already made before the verification of the answer, by the presentation of the warrants duly executed and in proper form, stands until thus destroyed.
3. SAME—SAME—EVIDENCE—COUNTY RECORD OF ALLOWANCE OF CLAIMS AND WARRANTS ISSUED—ABSENCE OF—INSUFFICIENT TO OVERCOME PRESUMPTION OF VALIDITY OF WARRANTS.—While the presentation of the records of the board of supervisors covering the dates on which the warrants were alleged to have been issued would have affected their validity if such records failed to show the authorization of the issue of the warrants or the allowance of the claims on which the warrants were based; nevertheless, evidence that the records of the county showed that the records of the allowance of claims and issue of warrants in this year 1884, the year of the issue of the warrants sued on, were entirely absent, and that the only record was that commencing in 1885, is insufficient to overcome the *prima facie* case made by the warrants declared upon.
4. SAME—SAME—STATUTE OF LIMITATIONS—WHEN CAUSE OF ACTION ACCRUES—FUNDS AVAILABLE FOR PAYMENT—COMP. LAWS ARIZ. 1877, CHAP. 6, SECS. 9-11, 13, AND CHAP. 2, SEC. 19, AND REV. STATS. ARIZ. 1887, PAR. 2314, CITED AND CONSTRUED.—The Compiled Laws of

1877, under authority of which these warrants were issued, provides (chap. 6, secs. 9-11, 13, *supra*) that the county treasurer shall, if there be money in the treasury, redeem warrants on presentation; if there be no funds, he shall indorse thereon "Not paid for want of funds," and when there are sufficient funds to redeem such warrants he shall give notice that he is ready to redeem, and warrants shall be entitled to preference in payment in the order of presentation. Chapter 2, section 19, of the Compiled Laws of 1877, *supra*, provides that where a judgment be recovered against county officers as such no execution shall issue, but the judgment shall be levied and collected as other county charges and paid by the county treasurer.

Held, that the bar of the statute of limitations (Rev. Stats. Ariz. 1887, par. 2314) against an action on a county warrant does not commence to run until there are sufficient funds in the county treasury to pay such warrants.

5. SAME—SAME—SAME—PLEADING—WARRANTS PAYABLE OUT OF PARTICULAR FUND—WHEN AVAILABLE.—Where county warrants are payable out of a particular fund to be created by the county, it cannot plead the statute of limitations until it shows that that fund has been provided.
6. SAME—SAME—SAME—STATUTE GOVERNING—REV. STATS. ARIZ. 1887, PAR. 415, INAPPLICABLE—PAR. 2314 GOVERNS—PAR. 2066 CITED.—The six months' limitation provided by paragraph 415, *supra*, for open account before adjustment is inapplicable to a suit on county warrants brought under the provisions of paragraph 2066, *supra*, for the purpose of having the board of supervisors approve the payment or exchange of such warrants from the county redemption fund thus provided. The five years' limitation (par. 2314, *supra*) governs such suit, it being an action on "an instrument in writing."
7. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—GENERAL ASSIGNMENTS CALL FOR NO DIRECT RULING.—An assignment of error that "the court erred in rendering judgment for plaintiff and against defendant, for the reason that the said judgment was contrary to the evidence in the case, and that it was contrary to the evidence as shown in the record, and against the law of the case," calls for no direct ruling, as it is not definite or specific, and simply raises in general terms the points already presented in the former assignments.

REVERSED. 177 U. S. 538; L. Ed. 44:878; 20 Sup. Ct. 718.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

J. F. Wilson, for Appellant.

The court erred in not sustaining defendant's general plea of limitation. Our statute (Rev. Stats., par. 2314) declares that "action for debt, where the indebtedness is evidenced by, or founded upon, any contract in writing, executed within this territory, shall be commenced and prosecuted within five years, and not afterwards."

That is this kind of a case, and therefore comes before the sweep of the statute, unless the fact that the defendant, one of the alleged parties to the action, being a county, and therefore an integral part of the state, is excluded from the operation of it.

As the law is, counties, where they deal with individuals, with matter of a private nature as distinguished from public, in which the maxim *Nullum tempus occurrit regi* is to be found, are bound by the statute of limitations the same as individuals, and therefore the same may be pleaded against them, and they also may plead them as defenses against matter barred by them. *Cunningham v. Sims*, 82 Mo. 587; *Houston R. R. Co. v. Travis*, 62 Tex. 16; *Baker v. Johnston*, 33 Iowa, 151; *Caldwell County v. Herbert*, 68 Tex. 321; *County of St. Charles v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *City of Alton v. Illinois Transfer Co.*, 12 Ill. 38; *Logan County v. Lincoln*, 81 Ill. 156; *Ft. Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19; *Wheeling v. Campbell*, 12 W. Va. 36; *Carpenter v. Union Township*, 58 Iowa, 335, 12 N. W. 280.

The alleged warrants sued on, as appears from their face, were seven years old and over when this action was brought, and therefore, on their face, as a matter of fact, they were barred. This would be so even if they were genuine.

From the face of the warrants, and the declarations made fixing the causes of action founded on them, they were barred as a matter of law, and the court erred in not so holding.

The warrants showed on their face that they were all issued in 1884, indorsed "Not paid for want of funds" in 1884, and not sued on until 1891; and the declaration emphatically charges that the said defendant at all times neglected and refused, and does now neglect and refuse, to provide for the payment, etc.

On the proposition of law that the statement of a plea must always be taken most strongly against the pleader, we

insist that, from the statement therein made,—“that defendant, at all times, neglected and refused, and does now neglect and refuse,” to pay, etc.,—the allegation of resistance on the part of the defendant is shown to have been made more than five years before the action was commenced, and therefore it was barred by the statute.

King Iron Bridge Co. v. Otoe County, 124 U. S. 459, 8 Sup. Ct. 582, is a decision following the ruling of the supreme court of Nebraska, interpreting its own statute, and in which it had held that the statute did not run against county warrants until the money was in the treasury to pay them, or that sufficient time had elapsed to permit the county to collect it.

That case showed the refusal to begin at the bringing of the action. This one shows that the refusal was at all times; and therefore more than five years before the bringing of the action. That being so,—and the complaint asserts that it is,—there was no legal reason to await the action of the county board to see if they intended to make arrangements for their payment. This did away with any such probability. It put the moving party, the holder, on knowledge that a defense was waiting for any action that might be brought, that the pretended obligation was resisted, and therefore the setting of the statute in motion began much more than five years before the action was brought. This shows that the Nebraska case is wholly inapplicable to the facts in this case.

Our statute makes the following provision: “Par. 735. Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit. . . . 8. A denial of the execution by himself, or by his authority, of any instrument of writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed.”

That is this case. The pleading of plaintiff is founded on the warrant, which is an instrument in writing. It is founded on it altogether—“in whole.” It is not alleged to be lost or destroyed. Its truth does not appear of record. The answer denies the execution of the instrument by the county of Apache, denies that it was ever issued by her authority, alleges that it is not genuine, alleges that it was and is a forgery, which, of course, reasserts that it was not executed

by her or by her authority. This answer was sworn to—"verified by affidavit"—as provided by statute. Thus the issues were joined in each and every count in the suit.

The plaintiff submitted no evidence other than the pretended warrants themselves, which were put directly in issue by the verified answer of the defendant.

The validity of these instruments being put in issue by the verity of the answer, as provided by the statute, the burden was thrown on plaintiff to show their validity, that they were legally issued, that the necessary steps were taken, beginning with the accounts from which they were alleged to have sprung, before she was entitled to judgment.

The verification of the answer threw the burden of proof on the plaintiff. She was bound to sustain the burden and prove her case. That this kind of answer does put the instrument in issue, see *Horn v. Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Corcoran v. Doll*, 32 Cal. 83; Green on Pleading, sec. 400.

T. W. Johnston and E. M. Sanford, for Appellee.

As to the statute of limitations: These warrants are not within the statute of limitations,—1. Because of the character of the obligations; 2. Because the county treasurer became, on the nineteenth day of April, 1888,—under the testimony, that being the first date after the issuance of the warrants when money was in the county treasury not otherwise appropriated, applicable to, or set apart for the payment of said warrants,—a trustee for the holder of said warrants.

And further, if there is any statute of limitations of which appellant may avail itself as against these warrants, it certainly did not begin to run until after there was money in its treasury otherwise unappropriated, applicable to the payment of these warrants,—to wit, April 19, 1888,—and the statute of five years invoked by appellant will not avail it, because suit was brought within less than five years after 1888,—to wit, in 1891.

That no statute of limitation runs against these warrants has been clearly decided by at least two cases in the supreme court of the United States.

In Nebraska, under statutes the same in spirit and almost identical in language as those under which these warrants

were issued, in the case of *Brewer v. Otoe County*, 1 Neb. 384, in deciding that these warrants were not subject to the statute of limitations, on page 384 the court said: "Whoever deals with a county and takes in payment of his demand a warrant of the character of these, no time of payment being fixed, does so under an implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition and the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce without regard to the condition of the treasury at the time, on the laws by which the revenues are raised and disbursed."

The same question arose in *King Iron Bridge Co. v. County of Otoe*, 27 Fed. 800, in which the federal court held directly the contrary, saying: "When a claim against a county has been audited, and warrants have been drawn on the treasury therefor, and such warrants have been accepted by the creditor, he must present them to the treasury for payment before he can properly sue the county thereon. When presented to the treasurer for payment, and payment is refused, the right to sue becomes complete and absolute, and the lawful holder of the warrants can then proceed to have his claim reduced to judgment."

However, this latter case was appealed to the supreme court of the United States, and upon the final decision of it upon the merits (124 U. S. 514, 8 Sup. Ct. 590), after approving the Nebraska decision, the court said: "According to the rule established in *Brewer v. Otoe County*, the cause of action did not accrue when the payment was refused, but only when the money for its payment was collected, or time sufficient for the collection of the money has elapsed."

Again, the holder of the warrant having dealt with the county, with the knowledge of the statutes above quoted under which these warrants were issued, which provide the methods and order of their payment, that statute becomes a part of his contract, which he could not enforce by a suit until the money was raised for the payment thereof, and the supreme court of the United States, in the case of *Chapman*

v. *Douglas County*, 107 U. S. 348, 2 Sup. Ct. 62, said: "But the more satisfactory answer to this defense is, that none of the statutes of limitation referred to apply to the case at all. We have already seen that by the decision in the case of *Brewer v. Otoe County*, 1 Neb. 375, it is the declared law of Nebraska that the claim against the county for the purchase money, on the supposition that the understanding had been to accept payment according to the terms of the statute, was not liable to the bar of the limitation acts."

Again, it will be seen from these warrants themselves that they are payable from special funds,—thirty-five of them from the general fund, and five from the road fund,—and the decisions are uniform to the effect that warrants, bonds, and such obligations payable from a particular fund or source cannot be defeated by statute of limitation until the county shows that there was money in the particular fund for the payment of those warrants, at least within the time of the statute of limitations attempted to be pleaded. *Freehill v. Chamberlain*, 65 Cal. 603, 4 Pac. 646; *Sawyer v. Colegan*, 102 Cal. 283, 36 Pac. 580; *Grayson v. Latham*, 84 Ala. 546, 4 South. 200, 866; *Caldwell v. Gwinn*, 54 Ala. 64; *United States v. Brown*, 41 Fed. 481.

The plaintiff's production of the warrants, in all respects regular on their face, signed by the proper officers, etc., made out her *prima facie* case, and that evidence sustained the findings of the court. *Clark v. City of Des Moines*, 19 Iowa, 227.

In *Grayson v. Latham*, 84 Ala. 546, 4 South. 200, 866, the court said: "Upon the question we have been discussing, the plaintiff made a *prima facie* case when he produced and proved his warrants, etc. . . . Making this *prima facie* case, . . . the burden would then be shifted to the defendant to overturn the presumption of liability."

"County and city orders signed by the proper officers are *prima facie* binding and legal. These officers will be presumed to have done their duty. Such orders make a *prima facie* cause of action. Impeachment must come from the defendant." Dillon on Municipal Corporations, 3d ed., par. 503; *Heffleman v. Pennington County*, 3 S. Dak. 162, 52 N. W. 851; *Ray v. Wilson*, 29 Fla. 342, 10 South. 614; *Merchants Nat. Bank v. McKinney*, 2 S. Dak. 106, 48 N. W. 846; *Lincoln v. Luning*, 133 U. S. 767, 10 Sup. Ct. Rep. 363; *Wall v.*

Monroe County, 103 U. S. 432; *Leavenworth County v. Keller*, 6 Kan. 311; *Cheyney v. Inhabitants etc.*, 60 Mo. 53; *Brewer v. Otoe County*, 1 Neb. 382.

Even had the answer been properly verified, the effect of it would have been to have permitted the defendant to have supported its various pleas, if it could, with competent testimony; it would not have shifted the *onus*. *Martin v. Lamb*, 38 S. E. 11.

DOAN, J.—This is an action by the executrix of Jacob Barth, deceased, based upon forty county warrants of Apache County, thirty-five of which are payable out of the general fund and five out of the road fund of said county. All were issued in the year 1884. All were presented in the year 1884, and after issue, to the appellant's treasurer for payment, and were by him indorsed "Not paid for want of funds." Again in the year 1888 the said warrants were presented to appellant's board of supervisors to be exchanged for bonds under the Funding Act of 1887, which exchange was refused, and the warrants in question were marked in red ink across the face thereof by the said board of supervisors "Forgery," and then returned to their owner. Suit was commenced in Apache County in the year 1891, and, after various changes of venue, was finally tried in Maricopa County, on the sixth day of May, 1896, on which trial the counsel for plaintiff voluntarily withdrew all claim on eleven of said warrants "because a careful, microscopical examination of the said eleven warrants would show there had been an alteration of the figures, and that they had been vitiated by being raised, and on them the plaintiff made no claim." The case was submitted to the court and taken under advisement, and thereafter, on the twentieth day of March, 1897, the court found that all of the warrants sued on, except the eleven that were withdrawn, were valid, subsisting, and legal claims against the said defendant, Apache County, and judgment was rendered on the remaining twenty-nine of said warrants in favor of the plaintiff and against the defendant for the sum of \$14,352.13 and costs of the action, from which judgment defendant has appealed to this court.

The appellant has presented five assignments of error, as follows: "First. The court erred in not sustaining defendant's general plea of limitation. Second. The court erred in

not sustaining defendant's special plea of limitation to each of the forty counts set up in plaintiff's amended complaint, and in finding against those pleas. Third. The court erred in finding that the warrants sued on, and each of them, save those admitted to be forged, was and were legally issued. Fourth. The court erred in finding against defendant's plea that said warrants, and each of them, were forged, and of no binding effect on defendant. Fifth. The court erred in rendering judgment for plaintiff and against the defendant, for the reason that the said judgment was contrary to the evidence in the case, and that it was contrary to the evidence as shown by the record, and against the law of the case."

We will consider these assignments in their natural rather than in their numerical order. The first point is that raised in the third assignment: "That the court erred in finding that the warrants sued on, and each of them, was and were legally issued." It has been held by the courts generally that "county and city warrants, signed by the proper officers, are *prima facie* binding and legal. These officers will be presumed to have done their duty. Such warrants make a *prima facie* cause of action. Impeachment must come from the defendant." Dillon on Municipal Corporations, sec. 502, and cases cited. These warrants, copies of which were attached to the complaint, and the warrants themselves introduced in evidence, were proper in form and appearance. The wording was in accordance with the requirements relative to such warrants. The names and signatures were of the proper officers, and appeared to be genuine. Evidence to show fraud or corruption or want of authority in their issue could have been presented, and, if presented, should have been received by the court; but, in default of evidence overturning the presumption in favor of the legality of their issue, the ruling of the district court was correct. The record does not show any defense offered by the defendant further than the denial of their execution, and the empty denial, unsupported by any evidence, was insufficient to overcome the presumption established.

The next assignment is the fourth: "That the court erred in finding against defendant's plea that the said warrants, and each of them, were forged, and of no binding effect on defendant." This leads us to consider the nature of the

pleadings. The complaint was founded upon the warrants in question, copies of which were attached thereto, and the originals were filed in the case and introduced in evidence. Paragraph 735 of the Revised Statutes of Arizona provides: "Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit: A denial of the execution by himself or by his authority of any instrument in writing upon which any pleading is founded in whole or in part and charged to have been executed by him or his authority." The answer of the defendant "denies that the board of supervisors of said county of Apache ever ordered the issuance of the said warrants sued on, or either of them; denies that the said warrants, or any or either of them, were ever issued or directed to be issued by the board of supervisors of the said county of Apache, or by the authority of said board." This answer up to the time the case went to trial and the plaintiff had presented her evidence and rested her case was unverified; but after plaintiff had rested, and defendant desired to establish the forgery of the warrants, it was permitted by the court to verify its answer. The verification was then made by the then recorder and *ex officio* clerk of the board of supervisors in the following language: "M. Gonzalez, being duly sworn, says that he is clerk of the board of supervisors of the county of Apache, in the territory of Arizona, and the custodian of the records of said board; that he has heard read the above and foregoing answer of the county of Apache, defendant in the above and foregoing action; and that the facts therein stated as defenses to the various causes of action declared on are true, and the warrants sued on are not genuine. Subscribed and sworn to the 6th day of May, 1896." It has been objected to this verification that it has not the essential elements of the affidavit required in the statute, and therefore is not sufficient to permit the defendant to attack the execution of the warrants, on the ground that the affidavit does not contain an allegation of knowledge on the part of the affiant, nor of information or belief upon points not within affiant's knowledge; that an affidavit that the facts stated are true does not apply to a denial; and that the allegation that "the warrants sued on are not genuine" is the statement of a conclusion of law. These points would be material if the defendant had gone forward

under the verification to the answer and presented evidence to disprove the execution of the warrants or to establish their invalidity by virtue of fraud, irregularity, or other cause; but as the only office of the verification would be to enable the defendant to establish such defense, and as no proof was offered and rejected by the court, for which rejection error is assigned, and none was presented to overcome the presumption established by the *prima facie* case already made by the plaintiff, the sufficiency of the verification does not become material, and any ruling thereon herein would be simply *obiter dictum*, unless on the theory advanced by defendant that the verification of the answer by defendant necessitates plaintiff's establishing by corroborative affirmative evidence the execution and issue of the warrants and the regularity and legality of the actions of the board in so doing. This position is not tenable. The weight of authority is decidedly that the effect and extent of the verification is to enable defendant to disprove by affirmative evidence the execution of the warrants or the regularity or legality of the proceedings on which their issue was based, and that the *prima facie* case already made by the presentation of the warrants, duly executed and in proper form, stands until thus destroyed. The supreme court of the United States held in a similar case, in *Wall v. Monroe County*, 103 U. S. 74: "The warrants in suit are evidences of indebtedness by the county, issued by that branch of its government to which is intrusted, by the laws of the state, the examination and approval of claims against the county. They are orders upon the treasurer to pay out of its funds for county purposes, not otherwise appropriated, the amounts specified. They establish *prima facie* the validity of the claims allowed and authorize their payment." The defendant objected to the introduction of the warrants in evidence. The court took the evidence subject to the objections, reserving his ruling thereon; hence there is no exception on the part of the defendant to the ruling of the court admitting the warrants in evidence. But at the time plaintiff made her case and offered the warrants in evidence there was no verified answer before the court to prevent the allowance of the warrants in evidence; hence it is not necessary to decide whether a verified answer should have excluded such warrants from evidence until duly proven. The answer was verified after plaintiff's

evidence had been presented and *prima facie* claim established and plaintiff had rested her case. "The plaintiff made a *prima facie* case when she produced and proved her warrants. . . . The burden would then be shifted to defendant to overturn the presumption of liability." *Grayson v. Latham*, 84 Ala. 546, 4 South. 202, 866. The *prima facie* case thus made might have been overcome by disproving the issue of the warrants or the allowance of the claims on which they were based, or the legality or validity of such action by the board, if it had actually been taken. The denial of their signatures by the officers whose names were attached to the warrants, or by experts or persons familiar with those signatures, or the presentation of the records of the board covering the dates on which the warrants were alleged to have been issued, if such records failed to show the authorization of the issue of the warrants, or the allowance of the claims on which the warrants were based, would have affected their validity. There was no evidence, however, introduced by the county tending to disprove the issue of the warrants in question by the board of supervisors, nor was there anything offered to attack or question the legality or regularity of their issue. The defendant introduced the testimony of the recorder of the county and clerk of the board, who was at the time of trial the custodian of the records. The records of the county produced by him showed that the records of the allowance of claims and issue of warrants in the year 1884 were entirely absent, and that the only record was that commencing in the year 1885. Neither he nor any other witness produced by the defendant offered testimony of any personal knowledge relative to the issue of the warrants in question by the board, or the allowance by the board of the claims in payment for which the warrants in question were issued. On this evidence the district court held that the warrants presented, apparently regularly and properly issued, were *prima facie* evidence of a valid, legal, and subsisting claim against the said defendant, Apache County, and that finding will not be disturbed by the appellate court.

It is contended by the appellant that the court erred in not sustaining defendant's general plea of limitation. Our statute provides (Rev. Stats., par. 2314) that "actions for debt where the indebtedness is evidenced by or founded upon any

contract in writing executed within this territory, shall be commenced and prosecuted within five years after the cause of action shall have accrued and not afterwards." The warrants sued on were issued in 1884. Suit was instituted in 1891. The appellant therefore contends that the claim is barred by the statute. It is necessary to consider the nature of the claim, and the statutes under which the warrants were issued, as well as the intermediate steps taken by the claimant during this time, in order to determine when the cause of action accrued; i. e. to determine at what time under the contract he had such a claim against the county as could have been enforced by an action at law. The Compiled Laws of 1877, under authority of which these warrants were issued, provide (chap. 6, secs. 9-11, 13) as follows:—

"Sec. 9. The county treasurer, when an order drawn on him as such treasurer, by the commissioners of his county, is presented for payment, shall, if there be money in the treasury for that purpose, redeem the same, and shall write on the face of such order, 'Redeemed,' the date of redemption, and shall sign his name thereto.

"Sec. 10. When any order or warrant shall be presented to the county treasurer for payment, and the same is not paid for want of funds, the treasurer shall indorse thereon 'Not paid for want of funds,' annexing the date of presentation, and sign his name thereto, and from that time until redeemed said order or warrant shall bear ten per cent interest per annum.

"Sec. 11. So soon as there shall be sufficient funds in the treasury of the county to redeem the orders or warrants drawing interest, the county treasurer shall give notice, . . . stating therein that he is ready to redeem said orders or warrants, and from the date of such notice said orders or warrants shall cease to bear interest."

"Sec. 13. Orders or warrants drawn on the county treasurer, and properly attested, shall be entitled to preference as to payment out of moneys in the treasury properly applicable to such order, according to the priority of time in which the same may have been presented. The time of presenting such order shall be noted by the treasurer, and upon the receipt of any moneys into the treasury not otherwise appropriated, it shall be the duty of the treasurer to set apart the same, or so

much thereof as may be necessary for the payment of such order or warrant."

It appeared in evidence on the trial of the case that the warrants sued on had in each instance, after their issue by the board, been presented to the county treasurer, and had been by him indorsed thereon "Not paid for want of funds," with the date of the presentation, and the signature of the county treasurer affixed thereto. It was also proven on the trial that the first date at which there were sufficient funds in the county treasury to redeem any of the said warrants was on the nineteenth day of April, 1888, and at that time the notice for the presentation of such warrants was made as provided in the statutes. It was further proven that the funds then in the treasury for this purpose were provided under the Funding Act of 1887, approved March 2, 1887, for the purpose of enabling the several counties to pay, redeem, or refund their outstanding indebtedness by the issue of bonds for such purpose, which bonds should either be exchanged for the warrants thus outstanding and drawing interest, or be sold, and the funds arising from such sale placed in the county treasury, and known as the "County Redemption Fund," and applied to the payment of outstanding county indebtedness under the provisions of that act, one of which was paragraph 2066 of the Revised Statutes of 1887: "The treasurer shall pay no warrant nor exchange for any warrant under this act unless the same has been presented to the board of supervisors and approved by a majority of such board; provided if, after any warrant has been refused by the board, the person holding the same shall recover a judgment against the county on such warrant, the said judgment may be paid under the provisions of this act." It appears that the holder of these warrants presented the same, under the provisions of the last section, to the board of supervisors of the appellant in the year 1888, in order to have them approved by said board for payment or exchange by the county treasurer, according to his advertisement, under the Funding Act; and that the warrants were then refused by the board, marked "Forgery," and returned to the holder. It is contended by the appellant that the cause of action against the county accrued on the date of the issue of the warrants, and that the statute began to run from that time. It is contended by the appellee that the cause of action

did not accrue until there were sufficient funds in the treasury to pay such warrants, which the testimony in this case shows to have been on the 19th of April, 1888. A county warrant is different from a promissory note, although it has been said that "a county warrant is, in legal effect, the promissory note of the county." *Board v. Day*, 19 Ind. 450. In the case of a promissory note or a bond with a definite time of payment, a cause of action accrues immediately upon the maturity of the instrument or the date of payment as fixed therein; but with a county warrant the case is different. "A municipal corporation is a subordinate branch of the domestic government of the state. As a local governmental institution, it exists for the benefit of the people within its corporate limits. Indebtedness may be incurred to a limited extent in carrying out the objects of the corporation. Evidence of such indebtedness may be given to the public creditors, but they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation." *Mayor etc. v. Ray*, 19 Wall. 468. It was held in *Brewer v. Otoe County*, 1 Neb. 373-384, in a similar case, arising under statutes almost identical with ours, that "Whoever deals with the county, and takes in payment of his demand a warrant in the character of these, no time of payment being fixed, does so under the implied agreement that, if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition of the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or of the laws by which the revenues are raised and disbursed. If there is money in the treasury belonging to the fund against which it is drawn, not otherwise provided, it is the duty of the treasurer to pay the warrant; but, if there be none, he must indorse upon it the fact of its presentation and non-payment for want of funds, and the holder must wait for his money until such time as it can be raised through the means which the legislature provides for the collection of revenues. Nor can any action rightfully be brought on such warrant until the fund is raised, or at least

sufficient time has elapsed to enable the county to levy and collect it in the mode provided in the revenue laws. The plea of the statute of limitations cannot be successfully made against these warrants, and, whenever it can be shown that the funds have been collected out of which they can be paid, or sufficient time has been given to do so in the mode pointed out in the statutes, their payment may be demanded, and, if refused, legally coerced." This decision of the supreme court of Nebraska was quoted and approved by Chief Justice Waite of the United States supreme court in *King Iron Bridge Co. v. Otoe County*, in 124 U. S. 459, 8 Sup. Ct. 582, in which the court held in a suit on warrants under similar circumstances to the case at bar that "the cause of action did not accrue when the payment was refused for want of funds, but only when the money for their payment is collected, or time sufficient for the collection of the money has elapsed." The application of this ruling to the case at bar is strengthened by the fact that it was rendered on the theory, as it is laid down generally, "that the judgment against a county or a municipal corporation is ordinarily no more than the mere establishment of a valid claim, for which it is the duty of the proper officers to provide means of payment out of the revenues of the defendant." Freeman on Executions, par. 22; Beach on Public Corporations, 1653; Dillon on Municipal Corporations, 576, and cases cited. But in this instance our statute specifically provides (Laws 1877, sec. 19, chap. 2): "When judgment shall be recovered against the county commissioners or against any county officer in an action prosecuted by or against him in his name of office no execution shall be awarded or issued upon such judgment, but the same unless reversed shall be levied and collected, as other county charges, and when so collected shall be paid by the county treasurer to the person to whom the same should have been adjudged, upon the delivery of the proper voucher." So that to hold that a right of action would exist in favor of the holder of the warrants or orders immediately after issue, and non-payment for want of funds, would authorize a suit against the county, which would only have entitled the successful litigant to a warrant drawn upon the treasurer by the same board who had already drawn upon the treasurer the warrant upon which the suit was brought, which would be a useless proce-

ture, and demonstrates clearly that such is not the contemplation of the law.

The further fact is alleged that thirty-five of these warrants were payable out of the general fund and five of them out of the road fund, and it has been repeatedly held by the courts in different states, and by the supreme court of the United States in *Lincoln County v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363, that "when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided." No provision was made by the county for the payment of these warrants until 1888. The statute of limitations did not therefore begin to run against the warrants until that time, and this suit, filed in 1891, was within the five years' limitation.

It is next assigned that the court erred in not sustaining defendant's special plea of limitation. Defendant alleged that the appellee "presented the said warrants, and each of them, to the board of supervisors, on the ninth day of January, 1888, and the same were then and there adjudged to be forgeries, and disallowed, and rejected as binding obligations upon said county; and the plaintiff did not, within six months thereafter, bring action on said warrants against the said county after such rejection, as provided in paragraph 415, sec. 35, Rev. Stats." The Revised Statutes provide, in regard to the presentation and allowance of claims against the county (par. 412): "The board of supervisors must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving the items duly verified, is presented to the board within six months after the last item of the account accrued." Paragraph 414: "When the board finds that any claim presented is not payable by the county, or is not a proper county charge, it must be rejected. If they find it to be a proper county charge, but greater in amount than is justly due, the board may allow the claim in part and draw a warrant for the portion allowed. . . ." Paragraph 415: "A claimant dissatisfied with the rejection of his claim or demand or with the amount allowed him on his account may sue the county therefor at any time within six months after final action of the board but not afterwards." These are provisions in regard to open accounts and unliquidated

claims, and are intended to relieve the county from having to meet the items of an open account years after the data relative to the items thereof may have passed from the knowledge of the officers of the county, and they, therefore, be unable to establish the facts in regard thereto, or to resist fraudulent claims or incorrect statements; and do not apply to a liquidated claim that has been audited and determined. On this subject, in *Heffleman v. Pennington County*, 3 S. Dak. 162, 52 N. W. 851, the court said: "The duty of the board is to judicially investigate the validity and justice of the claim, and to allow or disallow the same, in whole or in part, as to such board shall appear just and lawful. While the immediate purpose of the warrant is to enable the claimant to whom it is delivered to draw from the county treasurer the amount of money therein named, yet it rests upon, and its issue and payment could only be justified upon, the theory that after the full investigation the county had found itself to be so indebted; so that the warrant is a formal and deliberate acknowledgment by the county of such indebtedness." In the case of the warrants now under consideration, when the board of supervisors audited and allowed the accounts presented, and issued the warrants on the treasurer in payment thereof, they took those claims from the list of unliquidated accounts, and by their certificate and acknowledgment of the indebtedness of the county thereon placed them with the outstanding indebtedness of the county. The validity and amount of the liability were then definitely fixed, and warrants on the treasurer given, payable at a future time. The treasurer could pay them in order of presentation without further action of the board, if he had funds in his hands applicable to that purpose; and the presentation to the board afterwards, in 1888, was not made under the provisions of paragraph 415, as claimed by appellant, but, as heretofore stated, was made under the provisions of paragraph 2066 of the Revised Statutes, for the purpose of having the board approve the payment or exchange of such warrants from the fund thus provided; and the said paragraph 2066 specifically provided that "if, after any warrant has been refused by the board, the person holding the same shall recover a judgment against the county on such warrant, the said judgment may be paid under the provisions of this act." It is under the provisions of this paragraph that this suit is brought,

This directly contemplates action on the warrant, which is "an instrument in writing" to which the five years' limitation applies, and the six months' limitation provided by paragraph 415 for open accounts before adjustment is inapplicable.

The fifth general assignment does not call for special attention or direct ruling, as it is not definite or specific, and simply raises in general terms the points already presented in the former assignments. The record disclosing no error, the judgment of the district court will be affirmed.

Street, C. J., Davis, J., and Sloan, J., concur.

[Civil No. 572. Filed April 16, 1898.]

[52 Pac. 1117.]

F. A. KLEYENSTUBER, Defendant and Appellant, v.
JOSEPH M. ROBINSON, Plaintiff and Appellee.

1. IRRIGATION—INJUNCTION—INTERFERENCE WITH DITCH—EVIDENCE—PRIOR APPROPRIATION.—In an action to restrain defendant from interfering with an irrigating ditch, it is error to exclude evidence offered by defendant that, by means of artificial channels, and partly by using natural channels, he had used the water which plaintiff had testified plaintiff had used for five years for eighteen years prior to the commencement of the action for irrigating the lands owned by him.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

John McGowan, for Appellant.

Wiley E. Jones, for Appellee.

STREET, C. J.—This action was brought by Joseph M. Robinson, appellee, in the district court of Graham County,

against F. A. Kleyenstuber, appellant, to obtain a perpetual injunction prohibiting the defendant from interfering with a water-ditch. The defendant made a denial of all the allegations of plaintiff's complaint, and the cause proceeded to trial. Judgment was rendered against the defendant, Kleyenstuber, from which judgment he appeals to this court.

We copy at length the bill of exceptions, which is as follows, to wit: "Now, on this 18th day of July, 1896, comes the defendant, and files herein the following, viz.: Bill of Exceptions. On the 27th day of April, 1896, this cause came on regularly to be heard by the court, without a jury. Plaintiff was called as a witness in his own behalf, and used, to illustrate his testimony, a plat, identical in drawing with Defendant's Exhibit I (see Transcript, page 18). Plaintiff offered in evidence Exhibit B (page 14, Trans.). Objected to by defendant as incompetent, irrelevant, and immaterial, not tending to prove any averments of plaintiff's complaint. Objection overruled. Defendant excepts. Plaintiff testified that he had been in possession of the land described in his complaint continuously for five years, and that he had used the water mentioned in said complaint on said land, since June 4, 1895. Plaintiff and another witness testified that, just before the commencement of this action, they saw in said Frey's Creek an obstruction at the point where 'Robinson's Ditch' starts from said creek (Ex. I, Trans., page 18). Defendant offered to prove using Ex. I (Trans. p. 18), that by means of artificial canals, and partly by using the natural channels of said Frey's Creek, he had used the water of said creek for irrigating the lands owned by him, marked 'Kleyenstuber's Ranch,' (Ex. I, Trans. p. 18), for eighteen years prior to the commencement of this action, said water being the same which plaintiff testified he had used for five years. The court declined and refused to hear any of said proof of defendant, to which ruling defendant excepts. The court then held that plaintiff failed to prove any damages. The court forthwith rendered judgment in favor of the plaintiff, and against the defendant, to which judgment the defendant duly excepted, and gave notice of an appeal to the supreme court of Arizona. The foregoing are all of the proceedings had, and substantially all the testimony and evidence adduced at said trial." The court was clearly in error in refusing to hear the proof

of defendant. The judgment is reversed and the cause remanded to the district court of Graham County for a new trial.

Davis, J., Doan, J., and Sloan, J., concur.

[Civil No. 616. Filed April 16, 1898.]

[52 Pac. 1126.]

M. H. SHERMAN, Plaintiff and Appellant, v. WESTERN INVESTMENT BANKING COMPANY, Defendant and Appellee.

1. APPEAL AND ERROR—HARMLESS ERROR—JUDGMENTS—ENTRY NUNC PRO TUNC.—The entry of a judgment *nunc pro tunc* is of no consequence, unless the appellant was harmed thereby, and that the record wholly fails to show.
2. SAME—RECORD—MUST SHOW ERROR—BILL OF EXCEPTIONS—PRESUMPTIONS.—The record must, to render the objection available, affirmatively show, by a bill of exceptions or otherwise, that after the first submission of the cause had been set aside the court without hearing evidence decided the cause without subsequent submission. If the record is silent, the presumption in favor of the regularity of the court's proceedings must be indulged in to aid and support the judgment.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, and Thomas D. Bennett, for Appellant.

J. B. Early, for Appellee.

SLOAN, J.—The appeal in this case is taken from a judgment of the district court of Maricopa County, rendered in the suit brought by appellant, M. H. Sherman, against appellee, the Western Investment Banking Company, under the provisions of the garnishment statutes. The action was begun

by appellant filing an affidavit alleging that he had on the sixth day of June, 1895, in said court, obtained judgment against the Phoenix Electric Light Company and one H. Ohnick, for the sum of \$834.60, and that no part of this judgment had been paid; that the defendants, or either of them, had no property within the territory subject to execution sufficient to satisfy said judgment; that the affiant had reason to believe, and did believe, that the Western Investment Banking Company was indebted to the defendant H. Ohnick, and had in its possession effects belonging to said Ohnick. Upon this affidavit a writ of garnishment was duly issued and served upon the appellee, whereupon the latter made answer which in effect denied any indebtedness on its part to Ohnick or the possession of any property or effects belonging to Ohnick. This answer was controverted by appellant. The record fails to show whether or not under the provisions of paragraph 93 of the Revised Statutes a formal issue was formed under the direction of the court upon the coming in of the affidavit of appellant controverting the answer of appellee.

The appeal was taken under the provisions of the act approved March 18, 1897. No bill of exceptions or statement of facts appears in the record. The record filed consists of the original pleadings in the garnishment proceedings, the judgment, the motion for new trial, bond on appeal, the minute entries in the cause, and a transcript of the testimony in the case of M. H. Sherman against the Phoenix Electric Light Company and H. Ohnick, the latter being certified to by the clerk as a part of the record in the garnishment suit.

Upon the record thus presented we are asked by the appellant to reverse the judgment of the court below for irregularities in the proceedings that led up to the judgment and its rendition. These are charged to have been—1. That the court rendered judgment without any hearing and without a submission of the cause; and 2. That the judgment was rendered November 7, 1896, *nunc pro tunc*, as of June 30, 1896.

The latter objection is of no consequence, unless the appellant was harmed thereby, and that the record wholly fails to show. The first objection is fatal to the judgment, if true. There being no bill of exceptions or statement of facts in the record, we are left to the recitals in the judgment and to the minutes of the court to determine whether or not the court,

without the hearing of any testimony and without the submission of the cause, arbitrarily rendered judgment against appellant. The recital in the judgment is: "Now, on this, the 12th day of May, A. D. 1896, came on to be heard the above cause for trial, the plaintiff appearing by C. F. Ainsworth, attorney, and defendant by J. B. Early, attorney, and the cause, being heard, was submitted to the court; and on the 30th day of June, A. D. 1896, the court, after hearing the evidence and being fully advised as to the law, declared the law to be that defendant," etc. This judgment was filed with the clerk on the seventh day of November, 1896. The following facts were shown by the minutes: On May 12, 1896, the cause was first set down for hearing, and on that day was ordered submitted upon the testimony in the case of Sherman against Ohnick and others. On July 7, 1896, upon motion of appellant, the submission of the cause was set aside for further testimony. On November 6, 1896, the case was set down for hearing for November 7, 1896. On November 7, 1896, the following minute entry was made: "It is ordered by the court that judgment be entered for the garnishee as of June 30, 1896." Thus, the minutes show that the cause was set down to be tried November 7, 1896, and that on said day judgment was ordered. The filing upon the judgment is of the same day. The order of the court that judgment be entered as of June 30, 1896, and the filing of the judgment on November 7, 1896, evidences the fact that the judgment was actually rendered upon the latter date, and explains the recital in the judgment that the cause was decided upon the former date. No other facts pertaining to the proceedings in the case are in the record. Can we say from these facts that the court did not proceed regularly in the matter of the trial and disposition of the cause? Where the record does not affirmatively speak the presumptions in favor of the regularity of the court's proceedings must be indulged in to aid and support the judgment. The representation of appellant in his brief that after the first submission of the cause had been set aside the court, without hearing evidence, decided the cause without a subsequent submission is not affirmatively shown to be true by the record. We must therefore presume that the trial court proceeded regularly in the matter. If the fact be otherwise, it should have been shown by a bill of exceptions.

or otherwise affirmatively exhibited in the record. The judgment is affirmed.

Street, C. J., Davis, J., and Doan, J., concur.

[Civil No. 599. Filed April 16, 1898.]

[53 Pac. 7.]

**WILLIAM T. GRAY et al., Defendants and Appellants, v.
DANIEL NOONAN, Plaintiff and Appellee.**

1. **OFFICE AND OFFICERS—SHERIFF—OFFICIAL BOND—SURETIES—LIABILITY OF FOR TRESPASS IN LEVY OF ATTACHMENT ON GOODS OF THIRD PERSON.**—The taking by a sheriff upon a writ of attachment against one person of the goods of another is a breach of the condition of a sheriff's bond, for which his sureties are liable.
2. **SAME—SAME—SAME—PLEADING—CAUSES OF ACTION—VIOLATION OF DUTY—BREACH OF BOND—SEPARATE CAUSES.**—In an action against the sureties upon a sheriff's bond for violation of his official duty the cause of action is the breach of the bond, and not primarily the violation of duty.
3. **SAME—SAME—SAME—SAME—SAME—AGAINST SHERIFF FOR TRESPASS—AGAINST SURETIES FOR BREACH OF BOND—CUMULATIVE REMEDIES.**—The right of action against a sheriff for trespass and the right of action against the sureties upon his official bond for breach of his official duty in committing such trespass are cumulative remedies merely, and are not alternative remedies requiring an election; and a judgment against the sheriff individually for such trespass does not extinguish the obligation of the sureties.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

Street & Frazier, and Williams, Cox & Wilson, for Appellants.

By the allegations of appellants' second defense, set forth in the answer, appellee had in another suit elected to sue said appellant individually in tort, and said appellant had been sued by appellee in tort, as an individual only, for conversion

and for an individual trespass, and judgment had already been rendered by a court of competent jurisdiction against him, as an individual only, for conversion and for an individual trespass to the same property described in plaintiff's complaint in this action. Election is the right of choice between two or more steps or things by a person not entitled to all. An election is binding upon the person making it.

Appellee having elected to take judgment against appellant Gray individually in that suit, notwithstanding Gray had distinctly alleged that he took the property as sheriff by virtue of process, is now estopped and precluded from relitigating the same question. Wells on Res Adjudicata, 5, 6, 7, 11, 12; Freeman on Judgments, 58, 60, 252, 303; *Gray v. Dougherty*, 26 Cal. 272; *Hall v. Zeller*, 17 Or. 381, 21 Pac. 192; *Nichols v. Dibrell*, 61 Tex. 531; *Baxter v. Dean*, 24 Tex. 17, 76 Am. Dec. 89; *Taylor v. Harris*, 21 Tex. 439; *Cace v. Powell*, 20 Tex. 726; *Webb v. Mallard*, 27 Tex. 80; *Chilson v. Reeves*, 29 Tex. 275; *Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213; *Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546.

Having elected to pursue his several remedy, and having already recovered one judgment against the appellant Gray for the same cause of action, appellee could not in this case be permitted to pursue his joint remedy and make Gray a party to this action, and thereby obtain a judgment against him for the same cause of action and the same amount of money with accumulated interest. *Sessions v. Johnson*, 95 U. S. 347.

"Joint wrong-doers may be sued separately, and the plaintiff may prosecute the same until the amount of the damages is ascertained by verdict, but the injured party can have only one satisfaction, the rule being that he may make his election *de melioribus damnis*, which, when made, is conclusive in all subsequent proceedings." *Haydon's Case*, 11 Co. 50; *White v. Philbrick*, 5 Greenl. 147, 17 Am. Dec. 214; *Knickerbocker v. Colver*, 8 Cow. 111; *O'Shea v. Kirker*, 4 Bosw. 120.

Hancock & Perley, for Appellee.

"The judgment is no satisfaction; it is but the evidence of the satisfaction which the law says ought to be made." *Car-mack v. Commonwealth*, 5 Binn. 184.

"The only other question is whether the recovery of a judg-

ment by Konran against Wilson, for the conversion of the rifle, which judgment is unsatisfied, is a bar to this action. And we are perfectly clear that it is not. In *Carmack v. Commonwealth*, above cited, this precise point was adjudged. But we need no precedent. Officers are by the common law answerable for legal injuries done by their official acts under color of office. But they may not have pecuniary ability to pay the damages that may be recovered against them; or they may dishonestly avoid payment. Hence the statutory requirement that they shall give bonds, with sureties, for the faithful performance of their official duties; thus giving to a party injured by the officer's acts a cumulative remedy—that is, a remedy in addition to an action against the officer founded directly on his misdoings. Undoubtedly such party can have only one satisfaction; but a judgment in an action brought against the officer for his misdoings, is not *per se* satisfaction for the party's injury. It may be wholly worthless; and while it is unsatisfied, it can be no bar to an action on the officer's official bond." *Inhabitants of Greenfield v. Wilson*, 13 Gray, 384.

"The bond is a different cause of action from that on which the judgment was recovered. The bond is alleged as a joint bond, and the sheriff, as one of the joint obligors, was a proper party." *State v. Cason*, 11 S. C. 392.

"The election of plaintiff to proceed against the sheriff did not operate as a bar to further proceedings on his bond." *Charles v. Haskins*, 11 Iowa, 329, 77 Am. Dec. 148.

See, also, *Dennis v. Smith*, 129 Mass. 143; *Lewis v. Mills*, 47 Neb. 910, 66 N. W. 817; *Day v. Gallup*, 2 Wall. 97; *Buck v. Colbath*, 3 Wall. 334; *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 286; *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647; *People v. Schuyler*, 4 N. Y. 173.

SLOAN, J.—The main question presented by the record in this case is, Does an unsatisfied judgment rendered against a sheriff individually for the conversion of personal property seized by him under a writ of attachment, and which is the property of a stranger to the writ, constitute a bar to a subsequent suit upon the same cause of action, brought against the sheriff and his sureties upon his official bond? This question arises under the following facts: On the 11th of Febru-

ary, 1891, appellee, Daniel Noonan, obtained judgment in the court below against appellant William T. Gray in the sum of \$1,217.77, upon a complaint which charged that Gray had wrongfully taken personal property belonging to Noonan and had converted the same to his own use. In his answer in this suit Gray sought to justify the taking of the property by him as sheriff under and by virtue of a writ of execution against the property of J. A. Noonan, the wife of appellee. A writ of execution was issued upon this judgment against the property of Gray, which was returned *nulla bona*. Thereupon Noonan brought this suit against Gray and the other appellants, sureties upon his official bond given by him as sheriff, to recover damages for the taking and conversion of the same property described in the complaint in the original suit against Gray. A verdict was had for Noonan, and judgment entered accordingly.

The taking by a sheriff upon a writ of attachment against one person of the goods of another person is now held in the majority of state courts to be a breach of the condition of the sheriff's bond, for which his sureties are liable. This doctrine is approved by the supreme court of the United States in the case of *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 286, wherein Justice Gray, in the opinion, collates the cases upon this subject, and from the weight of authority, as well as upon principle, finds this rule of law fully sustained. The cause of action in such a suit is the breach of the bond, and not primarily the trespass committed by the sheriff. The written obligation to be answerable for any violation of the official duty of the sheriff alone constitutes the liability of the sureties. On the other hand, the primary liability of the sheriff is not dependent upon his official bond, but rests upon his common-law liability for the trespass. Although the same acts constituting the trespass on the part of the sheriff make the breach of obligation expressed in the bond, they give rise to several and distinct rights of action. The right of action against the sheriff for trespass and the right of action against the sureties upon his official bond for breach of his official duty are cumulative remedies merely, and are not alternative remedies requiring an election. The judgment against the sheriff individually does not extinguish the obligation of the sureties. There is no merger of the latter in

the judgment. The case is analogous to that where one holds cumulative securities. The holder of such is entitled to so many judgments as he has distinct securities, although he may not claim more than one satisfaction. Thus it has been held that in the case of a note secured by mortgage upon real estate a judgment upon the note did not extinguish the mortgage, and until the debt was satisfied the remedy of foreclosure of the mortgage still remained. *Butler v. Miller*, 1 Denio, 407. Accordingly, the supreme court of South Carolina, in the case of *Carmack v. Commonwealth*, 5 Binn. 184, held that "a judgment in trover against the sheriff is neither an extinguishment of his official security nor a bar to a suit against his sureties. It is but one of several remedies which the injured party may use successively until he obtains satisfaction." In the case of *Inhabitants of Greenfield v. Wilson*, 13 Gray, 384, *Carmack v. Commonwealth*, *supra*, is cited with approval, and the reason of the law is further extended in the following language: "Officers are by the common law answerable for legal injuries done by their official acts or acts under color of office. But they may not have pecuniary ability to pay the damages that may be recovered against them, or they may dishonestly avoid payment. Hence the statute requisition that they shall give bonds with sureties for the faithful performance of their official duties; thus giving to a party injured by the officer's acts a cumulative remedy,—that is, a remedy in addition to an action against the officer founded directly on his misdoings. Undoubtedly, such party can have only one satisfaction; but a judgment in an action brought against the officer for his misdoings is not *per se* a satisfaction for the party's injury. It may be wholly worthless, and while it is unsatisfied it can be no bar to an action on the officer's official bond." To the same effect are *People v. Schuyler*, 4 N. Y. 173; *Charles v. Haskins*, 11 Iowa, 329, 77 Am. Dec. 148; *Lewis v. Mills*, 47 Neb. 910, 66 N. W. 817; *Pico v. Webster*, 14 Cal. 203, 73 Am. Dec. 647. We find no error in the record, and the judgment is therefore affirmed.

Doan, J., and Davis, J., concur.

Street, C. J., having been of counsel in the district court, took no part in the consideration of the case in the supreme court.

[Civil No. 625. Filed April 16, 1898.]

[53 Pac. 6.]

MANLEY S. SNYDER et al., Defendants and Appellants, v.
PIMA COUNTY, Plaintiff and Appellee.

1. OFFICE AND OFFICERS—BONDS—SURETIES—SEVERALLY LIABLE — REV. STATS. ARIZ. 1887, PAR. 3081, CONSTRUED—NECESSITY FOR SIGNATURE OF PRINCIPAL.—Sureties signing an official bond, given under the provisions of paragraph 3081, *supra*, become severally liable, and where the principal is obligated by law to pay over money collected by him as tax-collector, the sureties who have guaranteed the fulfillment of the obligation cannot avoid their responsibility because their principal did not sign the bond with them.
2. SAME — SAME — DEFECTIVE — PRINCIPAL AND SURETIES EQUITABLY BOUND UNDER REV. STATS. ARIZ. 1887, PAR. 3086.—A bond guarantying the fulfillment of official obligations which does not conform to the statute may be recovered upon under the provisions of paragraph 3086, *supra*, that when an official bond is defective it is not void, but the officers and sureties are equitably bound.
3. APPEAL AND ERROR—SECOND APPEAL—JUDGMENT ON FIRST APPEAL NOT SUBJECT TO REVIEW.—A judgment of an appellate court in a case becomes the law of the particular case, and is not subject to review thereafter on second appeal.

OPINION on first appeal, 5 Ariz. 45.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, and Barnes & Martin, for Appellants.

The statute provides: "All official bonds shall be joint and several." Par. 3070. "Such bond must be signed by the principal and at least two sureties." Par. 3079.

These are statutory commands, and are plain and unambiguous. The first command is, that the bond "shall be in form joint and several." This bond is in form joint only. The second command is, that the bond "must be signed by the principal." This bond is not signed by the principal.

It therefore follows that this is not a statutory bond. No

construction except a manufactured one can make it so. It not being a statutory bond it must stand or fall as a voluntary or common-law obligation. The failure to make this distinction is the error this court made in its former opinion and decision.

The rule of law in this class of cases is this: "A surety has the right to stand on the precise terms of his contract." *People v. Buster*, 11 Cal. 220.

Cases covering joint and several bonds have no application to joint bonds, as is expressly held in the case of *City v. Dunlap*, 14 Cal. 424, 73 Am. Dec. 658, and as the bond at bar is a joint bond, not signed by the principal, it is therefore no bond, and no liability can be created thereby.

"The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of three. Some one must have written his signature first, but it is to be presumed upon the understanding that the others named as obligors would add theirs. Not having done so, it was incomplete and without binding obligation upon either." *City v. Dunlap*, 14 Cal. 424, 73 Am. Dec. 658; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758.

William M. Lovell, District Attorney, for Appellee.

Are the sureties released from liability upon the bond sued on because it was not signed by Snyder, the principal?

It will be observed that each of the sureties bound himself in the sum of five thousand dollars for the faithful performance of the duties of his office by Snyder. Are not the sureties liable for the amounts for which they severally bound themselves? It is true that paragraph 3078 provides that "all official bonds shall be in form joint and several, except as hereinafter provided, and payable to the territory of Arizona." But the bond sued on could not be joint and several, for the reason that Snyder, the principal, purported to be bound for the sum of twenty-five thousand dollars. The ten sureties, defendants, each bound themselves in the sum of five thousand dollars respectively, and no more; hence they are not jointly and severally, and could not be jointly and severally, bound

with the principal for the sum of twenty-five thousand dollars. The bond then falls within the exception of the above-quoted section 3078 of the Revised Statutes, and becomes a several bond under paragraph 3081, which provides that when the penal sum of any bond required to be given amounts to more than one thousand dollars, the sureties may become severally liable for portions not less than five hundred dollars thereof, etc.

If the sureties intended to bind themselves respectively in the sum of five thousand dollars, as appears from the face of the bond, then they are severally liable. As to whether they intended to bind themselves severally or not, must be gathered from the bond itself. "In all written contracts the language used is the primary guide to the meaning, but it is not always conclusive, the language is sometimes ambiguous and often not conclusive of an intent to contract either way. In such cases the sense must be derived from the interests and relations of the parties as appearing in the contract." Clark on Contracts, 604.

In the case of *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758, the supreme court of that state held that the sureties upon a bond similar to the one here under consideration were not liable. But it must be remembered that the California statute did not contain the exception contained in paragraph 3078 of our statutes. Neither did it appear in that case that the principal had signed the oath of office on the back of the bond and filed therewith.

The supreme court of Wisconsin, in the case of *Douglas County v. Brandon*, 79 Wis. 641, 48 N. W. 969, held that the sureties were liable on such a bond.

In the case of *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958, the supreme court of Montana held that where the liability of the principal in a bond is fixed by contract or operation of law, his failure to sign the bond does not affect the liability of the sureties thereon.

"The fact that such treasurer did not sign the bond did not exonerate the sureties on such bond from liability thereon, he having subscribed his oath of office on the back of such bond." *Hall v. State*, 69 Miss. 529, 13 South. 38.

"Where an officer writes his name in the body of an instrument which is delivered and accepted as his official bond, the

same is valid as such, notwithstanding the omission of final signature." *McLeod v. State*, 69 Miss. 221, 13 South. 268.

The decision of this court in this case upon the former appeal (5 Ariz. 45, 44 Pac. 297) is the law of this case, and cannot properly be reviewed upon this appeal. That decision is *res adjudicata* as to the law of the case, and is not now open to review in this case by this court.

A judgment by the trial court, according to the intimation and direction of the court of appeals on a former appeal, will not be disturbed. *Isert v. Davis*, 18 Ky. Law Rep. 510, 37 S. W. 151; *Bank v. Lewis*, 13 Utah, 507, 45 Pac. 890; *Krantz v. Rio Grande Western R. R. Co.*, 13 Utah, 1, 43 Pac. 623.

On a second appeal the case is governed by a decision on a former appeal as to a particular question, regardless of whether the question arose both times in the same manner. *Board of Comm'rs v. Bonebreak*, 146 Ind. 311, 45 N. E. 470.

A ruling on appeal becomes the law of the case on retrial, and is not reviewable on a second appeal. *Pierce v. Underwood*, 112 Mich. 186, 70 N. W. 419.

On a second appeal the judgment of the supreme court on a former appeal constitutes the law of the case. *Bradley v. Morris*, 67 Minn. 48, 69 N. W. 624.

On a second appeal the question of law decided on a former appeal are no longer open, but are *res adjudicata*. *Carpenter v. McDavitt*, 66 Mo. App. 1. See, also, *State v. Morse*, 66 Mo. App. 303; *Fink v. Insurance Co.*, 66 Mo. App. 513; *Meyer v. Shamp*, 51 Neb. 424, 71 N. W. 57.

On a second appeal it is immaterial that the decision on the former appeal was not correct, the remedy having been by a petition to rehear. *First Nat. Bank v. Asheville F. and L. Co.*, 120 N. C. 475, 26 S. E. 972; *Silva v. Packard*, 14 Utah, 245, 47 Pac. 144; *Pattern Paper Co. v. Canal Co.*, 93 Wis. 283, 66 N. W. 601, 67 N. W. 423; *Litton Coal etc. Co. v. Persons*, 15 Ind. App. 69, 43 N. E. 651; *Bank v. State*, 69 Tenn. 591; *Arnold v. Woodward*, 22 Colo. 348, 44 Pac. 507; *Whiting v. Bohlen*, 56 Ill. App. 287.

STREET, C. J.—This was an action brought in the district court of Pima County by Pima County, plaintiff, on the official bond of Manley S. Snyder, which had been executed to the territory of Arizona on the twenty-ninth day of December,

1888, to secure the performance of the official duties of Manley S. Snyder, as tax-collector of Pima County, for the term of two years, beginning on the first day of January, 1889, and ending on the last day of December, 1890, alleging that the said Snyder had, as tax-collector, failed to pay the amount of \$4,070 to the treasurer of Pima County, which he had collected as tax-collector and had converted to his own use. The bond was set out in the body of the complaint, *in hæc verba*, and revealed the fact that it had not been signed by Manley S. Snyder as principal, which defect in the bond was also suggested by the pleader in the body of the complaint. To this complaint a demurrer was filed, which was sustained by the district court, which rendered judgment in favor of the defendants, dismissing plaintiff's complaint. From that judgment the plaintiff, Pima County, appealed to the supreme court of the territory of Arizona. The appeal was heard and decided by this court on the ninth day of March, 1896, wherein this court reversed the judgment of the district court and remanded the cause to the same court, with directions to overrule the demurrer. The cause was thereafter tried in said court upon the merits, and on the sixth day of January, 1897, judgment was rendered in favor of plaintiff, Pima County, and against all of the sureties on said bond, and all of the defendants herein, except Manley S. Snyder, principal, for the sum of \$4,126.50. Manley S. Snyder, being out of the territory, was not served with summons, nor did he appear in the action. From that judgment the sureties have appealed to this court, and again raise the identical question heretofore decided on the former appeal,—to wit, "that Manley S. Snyder, as principal, not having signed the bond, whether the sureties were obligated thereon." That question was solved by this court on the former appeal, and the opinion therein may be found in 5 Ariz. 45, 44 Pac. 297, 298. This court then resolved that the bond, not having been given as directed by paragraph 3078 of the Revised Statutes, which directs that all official bonds be in form joint and several, except as otherwise provided, but having been given under paragraph 3081, which provides that sureties signing such a bond as this become severally liable, was a several bond, and not a joint bond, and it being a several bond, the signature of the principal was not essential; that the principal, Manley S. Snyder, being

obligated by operation of law to pay over the money collected by him as tax-collector, the sureties, who guarantied the fulfillment of that obligation, cannot avoid their obligation because their principal did not sign the bond with them. The rule contended for by appellants might apply where the principal is not obligated in any other way than by the bond, but only by virtue of having executed the bond. If Manley S. Snyder, the principal, was not obligated to Pima County in any other way than by the execution of the bond, the contention of appellants might not be without reason; but he does stand obligated by virtue of his office, by virtue of his oath, and by virtue of the obligation which he entered into, and Pima County could recover against him as well without a bond as with it. If his sureties signed a bond guarantying the fulfillment of his obligations which did not conform to the statute and become a statutory bond, it was at least such a bond as could be recovered upon under statutory regulation. Such species of bond is provided for by paragraph 3086, which reads: "Whenever an official bond does not contain the substantial matter or conditions required by law, or there are any defects in the approving or filing thereof, it is not void so as to discharge such officer and his sureties; but they are equitably bound to the territory or party interested." We are satisfied with the former judgment of this court upon that question, and see no reason for disturbing it. Even though we should now be convinced that this court has made a mistake in its former judgment directing the district court to overrule the demurrer and proceed to trial, yet that judgment is the law in this case. Its construction is more than *stare decisis*. It becomes *res adjudicata*. While this court may reserve to itself the right to reverse that decision as it may be applied to another case, yet it is well settled that a judgment of an appellate court in a case becomes the law of that particular case, and is not subject to review thereafter on second appeal. *Bradley v. Norris*, 67 Minn. 48, 69 N. W. 624; *Pierce v. Underwood*, 112 Mich. 186, 70 N. W. 419; *Commissioners v. Bonebreak*, 146 Ind. 311, 45 N. E. 470; *Krantz v. Railway Co.*, 13 Utah, 1, 32 L. R. A. 828, 43 Pac. 624; *Bank v. Lewis*, 13 Utah, 507, 45 Pac. 890; *Iserl v. Davis*, 18 Ky. Law Rep. 510, 37 S. W. 151. The supreme court of the United States, in *Stewart v. Salamon*, 97 U. S. 361, settles the

law for us in the following language: "An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves." In this case the district court overruled the demurrer, in accordance with the decree and judgment of this court, and heard the case upon its merits. To now reverse the judgment of that court by changing a rule laid down by this court for its guidance, would be to condemn the action of the judge for doing that which this court had directed to be done. The judgment of the district court is affirmed.

Sloan, J., Doan, J., and Davis, J., concur.

[Civil No. 592. Filed April 16, 1898.]

[52 Pac. 773.]

J. F. DAGGS et al., Plaintiffs and Appellants, v. NEILL B. FIELD et al., Defendants and Appellees.

1. **APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY—LAWS 1897, ACT NO. 71, CONSTRUED—DAGGS v. HOSKINS, 5 ARIZ. 236, FOLLOWED.**—Under the statute, *supra*, providing that the brief of appellant shall contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not so assigned shall be deemed to have been waived, a brief which is a printed argument in support of what are therein termed "contentions" does not satisfy the provisions of the law or the requirements of the rules of court, and no error appearing on the face of the record the judgment will be affirmed. *Daggs v. Hoskins, supra*, followed.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

George W. Glowner, and A. J. Daggs, for Appellants.

Herndon & Norris, for Appellees.

DAVIS, J.—There are no sufficient assignments of error made by the appellants in their brief. The act of the legislature approved March 18, 1897, relating to appeals and writs of error, under the provisions of which this appeal is taken, provides, among other things, that “the brief of the plaintiff in error, or appellant, shall . . . contain a distinct enumeration in the form of propositions of the several errors relied on, and all errors not assigned in the printed brief shall be deemed to have been waived.” The rules of the court likewise provide that all assignments of error must distinctly specify each ground of error relied upon. The brief filed by the appellants in the case at bar is a printed argument in support of what are therein termed “contentions,” and these, as previously held in the case of *Daggs v. Hoskins*, 5 Ariz. 236, 52 Pac. 350 (decided at the present term), under like conditions, do not satisfy the provision of the law nor the requirements of the rules of the court. No error appearing upon the face of the record, the judgment of the court below is affirmed.

Street, C. J., Sloan, J., and Doan, J., concur.

[Civil No. 570. Filed April 16, 1898.]

[53 Pac. 4.]

W. E. CURRY et al., Defendants and Appellants, v. COUNTY OF GILA, Plaintiff and Appellee.

1. TAXES AND TAXATION—BOND TO SECURE PAYMENT OF TAXES ON PERSONALTY—REV. STATS. ARIZ. 1887, PARS. 680, 2650, CITED.—A bond to secure the payment of taxes on personal property, given under paragraph 2650, *supra*, though executed to the territory, may be sued on by the county interested in the taxes covered thereby, paragraph 680, *supra*, providing that “every action shall be prosecuted in the name of the real party in interest.”
2. SAME—SAME—REV. STATS. ARIZ. 1887, PAR. 2650, CONSTRUED—LIABLE FOR TAXES FOR CURRENT YEAR.—The provision of paragraph 2650, *supra*, that for the purposes of seizure and sale of personal property for taxes the amount to be collected is regulated by the rate of the preceding year, is not intended as a release of the person owning property, and who has suffered a seizure, from payment of taxes

established and levied for the current year, and it is the duty of the principal on the bond to pay the amount of taxes assessed against the particular property released as the same appears against him on the duplicate assessment-roll of the current year.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

Peter T. Robertson, for Appellants.

The contention of appellants is, that this suit should have been brought in the name of the territory of Arizona, because the bond in this case runs to the territory and the territory is a real party in interest.

At common law a suit had to be brought in the name of the party named in the contract. No other could maintain the action. Hawes on Parties to Actions, par. 36.

And were this the rule to-day no question could arise as to the correctness of our position. The code has modified this rule and adopted that prevailing in equity; so now all suits must be prosecuted "in the name of the real party in interest." Rev. Stats., par. 680. We must therefore determine who is the "real party in interest," and, having so determined, must bring the suit in the name of said party, unless the statute specially provides otherwise.

Any person interested in the subject-matter of the suit who has a personal interest in the judgment is a "real party in interest," and unless joined in the action he cannot be bound by the judgment, and for this very reason the law says that he shall be made a party. Hawes on Parties to Actions, par. 18.

Actions in which the public are interested must be brought in the name of the people or state. *Frazer v. Freelove*, 53 Cal. 647; *Maxwell on Code Pleading*, 43; *State v. Poulterer*, 16 Cal. 516.

Certainly the people of the entire territory of Arizona are interested in the collection of the territory's tax. As regards the collection of taxes or money due the territory, they occupy the same position as the people of a county in relation to the collection of taxes and money belonging exclusively to the

county, or one of two joint owners of a promissory note to the collection thereof.

The case of *County of Sacramento v. Central Pacific R. R. Co.*, 61 Cal. 250, was one wherein the county of Sacramento had accepted from the defendant a compromise judgment. The attorney-general, acting on behalf of the state, moved to set aside the judgment, which the court refused to do, and from the order of the superior court refusing to grant the motion the attorney-general appealed. The ruling of the superior court was reversed, and the opinion of the supreme court was based upon the idea that the state was the real party in interest. They say, "So far as the state tax is concerned, the county is but a nominal party. . . . As to such tax, the state is the real party in interest." In other words, in California the state sues for its taxes in the name of the counties.

They further say that the supervisors have no control whatever of litigation relating to taxes due the state, and that the attorney-general, by virtue of his supervisory powers over the several district attorneys, may assume "paramount control of the business he and the district attorney are jointly conducting."

Now then, prior to the California act authorizing tax-suits to be prosecuted in the name of the counties all tax-suits for the state and county were prosecuted in the name of the state, under the general rule of pleading requiring suits to be prosecuted "in the name of the real party in interest."

Having the same rule here, unmodified by any special enactment like the California act of 1880, a suit cannot be maintained unless "prosecuted in the name of the real party in interest," and the real party in interest is the territory of Arizona.

J. S. Sniffen, District Attorney, and P. M. Thurmond, for Appellee.

The territorial treasurer is not a collector of taxes; his duties and powers are well defined. Rev. Stats., par. 2980. The territory has no power to collect taxes; it could not maintain a suit for the collection of taxes, and is therefore not a necessary party. It may be true that a part of the money collected belongs to the territory; it is collected by the county

and held in trust for the territory. If the territory has no power to collect taxes, it could not maintain a suit, and if made a party plaintiff with the county would be mere surplusage. If the county is the only agency authorized to collect taxes, it must have the power to enforce the collection thereof by law, and the district attorney is authorized to bring suit in such cases in the name of the county. *People v. De Pelanconi*, 63 Cal. 409; *People v. Ballerino*, 99 Cal. 598, 34 Pac. 330. If the bond sued on runs to the territory instead of to the county, it can make no material difference in that case. The principal and sureties bind themselves to pay to the tax-collector of Gila County all taxes listed and assessed for the year 1895. The statute does not prescribe in what form the bond shall be, or to whom made; only that the taxes payable to the county shall be secured. Rev. Stats., par. 2650. If the bond was executed to the assessor or to J. H. Thompson as an individual, and showing, as it does, its purpose, the county alone could sue on it. *Morgan v. Thrift*, 2 Cal. 562; *Baker v. Bartol*, 7 Cal. 551; *McDonald v. Askew*, 29 Cal. 200; *King v. Edwards*, 1 Mont. 238; *Wormouth v. Hatch*, 33 Cal. 127; *People v. Love*, 25 Cal. 521.

STREET, C. J.—1. Gila County, the appellee herein, brought an action in the justice court against the appellants herein, and suffered a judgment in said court, from which it appealed to the district court of Gila County, and there obtained a judgment against the appellants. The action was brought to recover on a bond in which M. E. Curry as principal, and Al. Despain and E. S. Conway as sureties, bound themselves unto the territory of Arizona in the penal sum of \$191.84. The bond was made a part of the complaint. The condition of the bond is as follows: "The condition of the above obligation is such that whereas, J. H. Thompson, the county assessor in and for Gila County, territory of Arizona, on the 15th day of April, 1895, did list and assess to the above-bound principal, M. E. Curry, certain personal property within said county, owned and controlled by the above-bound principal, at its full cash value, to wit, the sum of \$2,398, for taxes for the year 1895; and it appearing to said assessor that said principal did not own real property within said county of sufficient value in said assessor's judgment to pay the taxes on

both real property and personal property so listed and assessed; and whereas, said principal neglecting and refusing, on demand having been made by said assessor, to pay the taxes on said personal property so assessed for the year 1895, said assessor did immediately, to wit, on the 15th day of April, 1895, proceed to collect said taxes by seizure of sufficient of the personal property so listed and assessed, in the manner prescribed by paragraph 2650, Rev. Stats. Ariz.; and whereas, said principal desiring to have said personal property released from such seizure, gave this, his bond, for the release thereof, whereupon the said personal property was released from seizure by said assessor to said principal: Now, if the said M. E. Curry shall well and truly pay all sums due for taxes or to become due on said personal property so listed and assessed for the year 1895, to the tax-collector of Gila County, territory of Arizona, when the same shall be payable as prescribed by law, and before they become delinquent, then this obligation shall be void. It is expressly agreed by both principal and sureties that if demand be made by the tax-collector upon the principal at any time after said taxes become payable, that the principal will immediately pay said taxes, or, failing to pay the same, action may be immediately commenced upon this bond for the collection of said taxes. It is further agreed that if the said taxes be not paid before they become delinquent, that action may be immediately commenced upon this bond against said principal and sureties without any demand whatever." The bond was given in compliance with the provision of paragraph 2650 of the Revised Statutes of Arizona, which provides that the county assessor, when he assesses the property of any person who does not own real estate within the county of sufficient value to pay the taxes on both his real and personal property, shall proceed immediately to collect the taxes on the personal property so assessed; and if such person shall neglect or refuse to pay such taxes, the assessor shall seize sufficient personal property to satisfy the taxes and costs, and shall, after notice, sell the same at public auction in sufficient quantities to pay the taxes and expenses incurred: provided that, if the owner of the property seized shall give bond with sufficient security, to be approved by the assessor, and in an amount sufficient to recover the amount of taxes due and the costs incident to the seizure, the said property shall

be then released. Said section also provides that the assessor shall be governed as to the amount of taxes to be by him collected in this manner by the territorial and county rate of the previous year. A demurrer was filed by the defendants to the complaint, and overruled by the court, in which was raised the question that Gila County was not the proper party plaintiff, and that the suit should have been brought in the name of the territory of Arizona, the territory being the obligee named in the bond. A further question raised by the bill of exceptions is upon the fact that Curry made a tender to the tax-collector some months after the bond had been delivered to the assessor, and during the taxpaying time for that year, of a certain amount of taxes which he claimed was the basis of his assessment; and the tax-collector refused to take the amount so tendered because not being the full amount of taxes due as shown by the duplicate assessment-roll as fixed by the board of equalization.

2. Upon the question that the territory should have been the party plaintiff instead of Gila County, paragraph 680 of the Revised Statutes of Arizona provides that "every action shall be prosecuted in the name of the real party in interest," which was amended by act No. 22 of the Session Laws of 1893 by adding a proviso, but not in any way affecting this question. The only pretense upon the part of the appellants that the territory had any interest in the cause of action is that \$17.98 of the amount sued for belonged to the territory. The court, in *Territory v. Bashford*, 2 Ariz. 246, 12 Pac. 671, 672, has decided that the county is a proper party to bring an action where it is interested in the funds sued for, although the territory may have some interest likewise in the funds. The collection of taxes is a county function, and the duty of such collection is relegated to the counties. After the taxes are collected it is then the duty of the county to pay over a certain per cent thereof to the territorial treasurer; but nowhere under our revenue system is it made the duty of the territory to collect the taxes. The complaint, and bond, which is a part of the complaint, clearly show that the bond was given for the benefit and use of the county in the exercise of its function of collecting taxes for 1895. Although the bond was executed to the territory of Arizona, it was delivered to the tax-collector for the use and benefit of the county of Gila. Had the

complaint contained an allegation that the bond was given for the use of the county of Gila, it could not have been pretended that a demurrer would lie, or that the county had not a right to sue on the bond; but the complaint, taken with the statute under which the bond was given, clearly shows the purpose of the bond and the interest of the county. *People v. Haggin*, 57 Cal. 586; *Mendocino County v. Lamar*, 30 Cal. 628; *Sacramento County v. Bird*, 31 Cal. 72; *Mendocino County v. Morris*, 32 Cal. 145.

An answer to the second question raised by the appellants is clearly made by the terms of the bond and the provisions of the statute under which the bond was drawn, for it is the provision of the statute that such bonds shall be in an amount sufficient to cover the amount of the taxes. This bond provides that the said Curry shall well and truly pay all sums due for taxes or to become due on said personal property so listed and assessed for the year 1895 to the tax-collector of Gila County, territory of Arizona, when the same shall be payable as prescribed by law, and before they become delinquent. It is true that for the purpose of seizure and sale the amount to be collected in such cases is regulated by the rate of the preceding year, for the reason that the rate for the current year was not then established by the board of equalization. Such provision, however, is not a release, nor intended to be a release, of the person owning property, and who has suffered a seizure, from payment of taxes in such amount as may be established by the board of equalization, and levied for the current year. It was clearly the duty of Curry, as principal on the bond, to pay the tax-collector the amount of the taxes assessed against the particular stock released under the bond as the same appeared against him on the duplicate assessment-roll. To have fully discharged his obligation and that of his sureties on the bond, he should have paid the same. The judgment of the district court of Gila County is affirmed.

Sloan, J., Davis, J., and Doan, J., concur.

[Civil No. 579. Filed April 16, 1898.]

[53 Pac. 197.]

**F. E. JORDAN et al., Plaintiffs and Appellants, v. JOHN
DUKE et al., Defendants and Appellees.**

1. **APPEAL AND ERROR—REVIEW—REVERSIBLE ERROR.**—A judgment rendered upon the verdict of a jury must stand, unless there be shown some error of the court in directing the issues, or the introduction or rejection of evidence, or the instructions to the jury, where there is no question as to the sufficiency of the evidence to support the verdict.
2. **MINES AND MINING—SUIT TO QUIET TITLE—REV. STATS. ARIZ. 1887, PAR. 3132, AS AMENDED, LAWS 1891, ACT NO. 46, CITED—ISSUES—GENERAL DENIAL—CROSS-COMPLAINT SETTING UP TITLE IN DEFENDANTS—APPEAL AND ERROR—INSTRUCTION AND EVIDENCE—ERROR AFFECTING GOVERNMENT, WHEN REVIEWED.**—Where in an action to quiet title to mining ground, brought under the provisions of the statute, *supra*, the defendants go to trial upon a general denial only, the whole issue is as to the validity of the plaintiffs' claim and the right of plaintiffs to maintain the same as against the government; but where defendants have filed a cross-complaint, setting up a claim within themselves, the issue becomes one between the plaintiffs' claim and the government, between defendants' claim and the government, and between plaintiffs' and defendants' claims. In such contests, where a verdict is rendered for either claimant and against the government, evidence and instructions pertinent to the issues as to whether the successful claimants' location was valid as against the government become immaterial and will not be reviewed on appeal.
3. **PARTIES—DEFENDANT—TRANSFER OF INTEREST—ADDING PARTY—REV. STATS. ARIZ. 1887, PAR. 725, CITED.**—It is not reversible error for the trial court to allow a person who has purchased defendants' claim pending the action to be added as a party defendant, plaintiffs not being injured thereby. The statute, *supra*, providing for substitution of parties where there is a transfer of interest, cited.
4. **MINES AND MINING—AMENDED LOCATION NOTICE—EVIDENCE—NOT CHANGING RIGHTS—HARMLESS ERROR.**—The introduction of an amended location notice, made with reference to the original location, for the purpose of curing possible errors therein, is harmless although useless, there being no contest as to the original location being invalid in any other way than that the ground at the time such location was made was not subject to location.
5. **SAME—LOCATION NOTICES—RECORDING ACT—LAWS 1895, ACT NO. 42, APPROVED MARCH 20, 1895; REV. STATS. ARIZ. 1887, PAR. 2349, CITED**

—REGISTRATION ACT—CONSTRUCTIVE NOTICE.—Prior to the statute, *supra*, there was no penalty attached to a failure to record a location notice. The law, *supra*, prior to that time was in effect but a registration act, and location notices recorded under it simply imparted constructive notice as any other registration act.

6. EVIDENCE — MAPS — ILLUSTRATIONS OF TESTIMONY — SUBSTANTIVE EVIDENCE.—A map prepared by an engineer who was upon the ground and took the bearings and distances of certain monuments in relation to each other and to other objects, as they were pointed out to him by the locator, from his field-notes, unless it is to be used in evidence as a substantive and independent piece of evidence, need not be proved to be correct before admission in evidence; and where the map is proven to be a correct representation of the lines connecting the objects pointed out to the engineer, it is not necessary that it should be able to stand the tests as to whether the monuments represented were the correct monuments, it being used in connection with the testimony of witnesses to show that which they were endeavoring by words to explain.
7. MINES AND MINING — ASSESSMENT-WORK — RESUMPTION OF WORK — PREVENTS FORFEITURE—UNTIL FAILURE TO COMPLETE WORK.—If assessment-work be not completed on a mining claim in any part of the year in which the statute requires it to be done, but the owners thereof are upon the ground for the purpose of doing the work before the year expires, and then prosecute the work to completion, the work so prosecuted will have relation to the year in which it should have been done, and such resumption will prevent the claim from being forfeited until there is a failure to prosecute the work after the same has been resumed.
8. SAME—RELOCATION, WHEN VALID.—Until a location has been abandoned or has been forfeited no other location can be made of the ground.
9. SAME—ASSESSMENT-WORK—RESUMPTION OF WORK—AFTER EXPIRATION OF YEAR AND BEFORE OTHER RIGHTS ATTACH.—If the first locator of mining ground resumes work at any time even after the expiration of the year, but before other rights attach in favor of relocation, he preserves his claim.
10. SAME—SAME—SAME—RELOCATION—SUBSEQUENT FORFEITURE—RELATION.—Where the locators of mining ground were upon it the last day of December and asserted they were there for the purpose of resuming work, and continued in possession for five or six days afterward, making an expenditure of sixty dollars, when they went away and never returned, an attempted relocation made by other parties on the first day of January is void, the former claim not being subject to relocation until the owners quit work, several days thereafter, there being no such thing as making a location of ground not open to relocation by reason of being already relocated, and then, because of failure on the part of the owners to support that

claim either by abandonment or forfeiture, have the relocation relate back to the original act.

DISMISSED with costs on authority of counsel for plaintiffs in error.
43 L. Ed. 1185, 19 Sup. Ct. 877.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Affirmed.

The facts are stated in the opinion.

F. E. Corbett, Herndon & Norris, and John J. Hawkins, for Appellants.

It may be admitted that under the petition of Schuerman, and with the consent of defendants, the court had power, under section 725, had the application so to do been made within the proper time, to substitute Schuerman as the *sole* defendant in the action. The statute expressly provides that in the case of a transfer of interest pending suit the cause may be continued either in the name of the original party or in the name of the transferee; and nowhere does it appear in the statute that any such action may be continued in the name both of the original party and the transferee. *Estee on Pleading*, sec. 4494; *Virgin v. Brobaker*, 4 Nev. 31; *Noss v. Shear*, 30 Cal. 476; *Walker v. Felt*, 54 Cal. 386.

The court erred in permitting the introduction in evidence, and in permitting to be exhibited to the jury, a certain map and a certain model of the ground prepared by the defendants, for the following reasons: It is plain from the testimony introduced in the action at the time the map and model were offered, and at other times throughout the progress of the case, that this map and model were made upon the statements and representations made to the persons who constructed the map and model by W. H. Ferguson, who, it appears from all the evidence in the case, was not the locator of all the claims shown upon the map and model,—who was in fact the locator of only three of such claims.

In the case of *Bunker Hill etc. Min. Co. v. Schnellling*, 79 Fed. 263, the following doctrine is laid down upon the subject of admission of maps, and the same rule will apply to a model. The decision of the court is as follows: "Another point made on behalf of the plaintiff in error, is that the court,

against the objection and exception of the plaintiff in error, admitted in evidence a diagram of the stope where the accident occurred, made by one Easton upon the representations of witness Powers and others as to its appearance after the accident, and the court admitted it in connection with his testimony only as his version of the works, which the jury might consider for what it was worth."

The rule is that such a map and model as were offered and admitted in this case may be taken by the jury for what it is worth, as the version or opinion of witnesses making the same, but even under this broad rule the action of the court in admitting this map and model cannot be upheld, for the reason that after the map and model were admitted then, over the objection of the plaintiffs, the court permitted all the witnesses who testified for the defendant to testify from the map or model, using the same with their testimony, and thereby assuming that the map and model correctly delineated the ground in controversy and all other matters which they purported to represent.

If the map were introduced as a part of the testimony, and for the purpose of explaining the testimony of the witnesses who made it, and if it was competent for that purpose, it cannot be argued that it was therefore competent for all purposes, and that all witnesses had a right to testify thereupon. See *Commonwealth v. Switzer*, 134 Pa. St. 383, 19 Atl. 681; *Kansas City Railroad etc. Co. v. Smith*, 90 Ala. 25, 24 Am. St. Rep. 753, 8 South. 43; *Burwell v. Sneed*, 104 N. C. 118, 10 S. E. 152; *Hoge v. Ohio R. R. Co.*, 35 W. Va. 562, 14 S. E. 152; *Poling v. Ohio River Railroad Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; *Turner v. United States*, 66 Fed. 289; *Wood v. Willard*, 36 Vt. 82, 84 Am. Dec. 659.

Mere possession of the mineral land is good as against a mere intruder, but not as against one who has complied with the laws and made a legal location. *Atwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567; *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574; *Hass v. Winder*, 30 Cal. 349; *Du Prat v. James*, 65 Cal. 556, 4 Pac. 562; *Golden Fleece etc. Co. v. Cable etc. Co.*, 12 Nev. 312; *Noyes v. Black*, 4 Mont. 527, 2 Pac. 769; *Funk v. Sterrett*, 59 Cal. 613; *Patchen v. Keeley*, 19 Nev. 404, 14 Pac. 347.

A location not made in accordance with the provisions of the United States statutes and local laws never becomes a location to any extent whatever, and vests no title or rights in any claimant thereof. The ground attempted to be located, not having been located according to law, remains the public domain of the United States, subject to entry and location by any citizen.

"The right to the exclusive possession of mineral land not actually held in *possessio pedis* may be acquired only by a legal location thereof." *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906.

"Mere possession of mining ground without location is good as against an intruder who made no location." *Neubaumer v. Woodman*, 89 Cal. 310, 26 Pac. 900.

And, conversely, mere possession not based on a valid location, is not good as against one who has made a location on the land in the manner prescribed by law, and the possession of such locator shall prevail over such prior possession. *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 739.

Discovery with possession, but without location, is not valid as against a subsequent peaceable location. *Horsewell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Gleeson v. Mining Co.*, 13 Nev. 442.

A party to a suit of this character involving the possession of a mining claim is not required to prove representation work upon the claim after having proved the proper location thereof, unless it be pleaded by the opposite party that the mining location which is relied upon has been abandoned and forfeited by reason of the failure to perform representation work, and there being no such issue in this case, according to the pleadings, it was unnecessary that any party should have introduced any evidence showing the performance of annual work upon either the Copper Chief or the Equator claims. The instruction of the court goes outside of the pleadings and issues in the case and instructs the jury that it may find against the Equator location, should they find that one hundred dollars' worth of work had not been performed thereon in each year during the several years mentioned in the instruction, thereby informing the jury that they could decide the case upon an immaterial question of fact and upon points not raised by pleadings. "The failure to do annual labor must

be specially pleaded." *Renshaw v. Switzer*, 6 Mont. 464, 13 Pac. 127, 15 Morr. Min. Rep. 345.

"A later location must plead a failure to do the work prior to such location, thereby showing a forfeiture." *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936.

The jury was informed that if the original Copper Chief location and the original Equator location were both invalid, and that therefore neither of the parties to this suit ever had any title to the ground prior to the institution of any proceedings in this action, then the jury could still in this same action find in favor of Schuerman, who was not a party thereto, by reason of the title acquired by him after the institution of all proceedings. This was error. If in such an action as this the jury should find that the locations in conflict are both invalid, the United States statutes provide that the jury shall find in favor of the United States.

"Neither party in an adverse suit can gain any rights by acts performed subsequent to the filing of the adverse claim." *Moxon v. Williamson*, 2 Mont. 421, 12 Morr. Min. Rep. 602.

Franklin E. Brooks, W. H. Barnes, and T. W. Johnston, for Appellees.

The amendment of pleadings during the progress of a cause and the admission of new parties is a matter entirely within the discretion of the court. It is true that this is a judicial discretion, and therefore open to review; but in the case at bar it is evident that the discretion was deliberately exercised, and that the amendment and introduction of the new party was made with deliberation, and under terms which were very severe upon the appellees. The discretion not having been abused, the action of the trial court will not be disturbed by this court. *Harrington v. Connor*, 51 Neb. 214, 70 N. W. 911, 6 Am. & Eng. Corp. Cases, 609; *People v. Sexton*, 37 Cal. 532.

As to the performance of annual labor, the language of the statute is express and definite. Upon a failure to comply with these conditions (viz., the performance of one hundred dollars' worth of work between the first day of January and the last day of December of each year), the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever

been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location.

It will be borne in mind that this is a portion of an act which provides for one hundred dollars' worth of work in each calendar year, but the only penalty for failure so to do is to make the ground, if the locator does not resume work thereon, subject to relocation thereon by others. This forfeiture is not an absolute one, but rather one upon condition. If the condition be performed,—i. e. re-entry before location by another,—the forfeiture never becomes operative. If, however, before such re-entry the ground should be located by another, then the forfeiture would become absolute. There is no need of resort to the well-recognized doctrine that forfeitures are not favored by the courts, for the statute itself is clear and explicit that there shall be no forfeiture in case of a resumption of work by the locator before another relocates the ground.

No suggestion is contained anywhere in the act which looks toward any requirement for cumulative work in case of an abandonment or forfeiture and a subsequent re-entry. No citation is given in support of any such theory. The contrary is distinctly involved in the decision in *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 739.

The reason for the contrary view is obvious. The theory of the government is, that in the first instance only the government itself and the locator are concerned. As against the locator, the government, in its bounty, disregards the inability of the prospector to keep alive his location from year to year, and allows him at any time before relocation by another to reinvest himself as of his former estate. It is evident that if he in any year complies with the statutory requirements for that year alone, and before other rights have accrued, he has placed himself in a position to challenge the world upon this proposition.

If during the year of re-entry one hundred dollars' worth of work is performed, the case stands as though no failure had ever occurred. No time limitation when the party shall re-enter and resume his title is laid down either by the statute or the courts. This may be done at any time. *Lakin v. Sierra Butte G. M. Co.*, 25 Fed. 337, 11 Saw. 231, 241; *Jupiter*

M. Co. v. Bodie Con. Min. Co., 11 Fed. 666, 7 Saw. 96; *North Noonday M. Co. v. Orient M. Co.*, 1 Fed. 522, 6 Saw. 299.

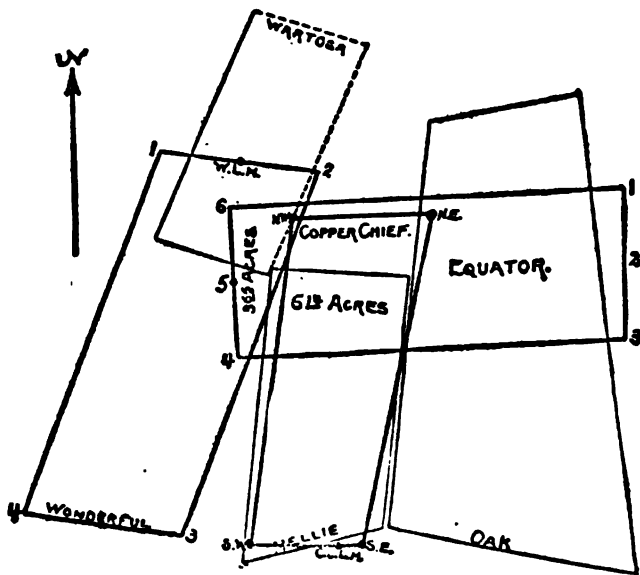
STREET, C. J.—The appellees Duke & Ferguson filed in the land office in Prescott, Arizona, in May, 1891, an application for patent to a certain mining claim in Verde Mining District, Yavapai County, Arizona, called the "Copper Chief." In July thereafter appellants filed in said land office their contest to said application for patent to said Copper Chief mining claim on the ground that 6.14 acres of land embraced in the Copper Chief mining claim was the property of appellants, and within the limits of a certain mining claim belonging to them called the "Equator." Upon the filing of said contest the usual order was made in the land office, stopping all further proceedings until the rights of the parties to that portion of said mining claim in contest could be ascertained by a court of competent jurisdiction. Appellants thereafter instituted this suit against the appellees Duke & Ferguson, claiming title and the right of possession of 6.14 acres of land embraced within the Copper Chief mining claim, as well as within the Equator mining claim, as shown by the diagram accompanying this opinion. The action by appellants against appellees is in the nature of a suit to quiet title under the provisions of paragraph 3132 of the Revised Statutes of Arizona, as amended by act No. 46 of the sixteenth legislative assembly of Arizona, approved March 17, 1891, which reads as follows: "An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against another who claims an estate or interest adverse to him."

To the complaint of plaintiffs the defendants Duke & Ferguson filed a general denial, and the cause proceeded to trial before a jury in the district court of Yavapai County, where the same was instituted. Verdict and judgment were in their favor, and from which judgment appellants prosecuted an appeal to this court, and obtained a reversal thereof and a new trial upon an assignment of error, covering certain instructions given by the court to the jury. Before the cause was tried anew it suffered a change of venue to Pima County, and thereupon the defendants Duke & Ferguson amended

their answer and filed a cross-complaint setting up title to the land in dispute, and asked that their title be quieted against the claim of appellants. The cause was tried before a jury, and after the plaintiffs had rested their case, and the defendants Duke & Ferguson had introduced a large body of their testimony, the defendant Schuerman obtained leave of the court to be added as a party defendant upon showing to the court that he had succeeded to the interests of Duke & Ferguson in and to the Copper Chief mining claim.

The dispute to the ground in contest arises upon priority of location of the Copper Chief and the Equator mining claims respectively. The ultimate facts presented to the jury upon which they might determine the priority of location are as follows: That W. H. Ferguson and James Biddle located a mining claim called the "Nellie" on December 20, 1879, who also relocated the same ground on February 26, 1880, because of some supposed defects in the location of December, 1879, which claim, during the trial, was, for convenience, designated as "Ferguson's Nellie"; that one George V. Kell and Robert K. Evans located the same ground on January 2, 1882, and gave it the name of "Nellie," under the supposition and claim that the annual expenditure or representation work had not been done upon the claim of Ferguson's Nellie in the year 1881. This claim was likewise designated at the trial as "Kell's Nellie." Ferguson, disregarding Kell's Nellie as a valid location, and insisting that the annual expenditure on Ferguson's Nellie had been made for the years 1880 and 1881, and therefore it was not subject to relocation until 1883, located the Copper Chief October 13, 1883, which substantially covered the ground formerly located as Ferguson's Nellie, and also located as Kell's Nellie, besides covering other and more ground embraced in the Equator claim. Afterwards Duke became the co-owner with Ferguson in the Copper Chief. The appellants F. E. Jordan, E. A. Jordan, and W. A. Jordan, disregarding the Copper Chief location, and holding that the location of Kell's Nellie was a prior subsisting location to the Copper Chief, and claiming that the annual expenditure had not been made by Kell and the owners of Kell's Nellie for the year 1883, went upon the ground January 1, 1884, and made a location of the Equator claim. The defendant Head afterwards purchased an interest in the Equator claim.

The relative locations of the Copper Chief and the Equator mining claims are shown on the accompanying diagram in deep black lines:—



It was admitted that the annual expenditure for 1883 had not been done on Kell's Nellie in the year 1883, but when the locators of the Equator claim arrived on the ground on the last day of December, 1883, they found the owners of Kell's Nellie on the ground also, and about ready to resume representation or annual expenditure work on their location of the Nellie. The owners of Kell's Nellie remained upon the ground for some six days, and did work thereon to the amount of about sixty dollars, when they quit and went away.

The prime question for the jury to solve was whether Ferguson's Nellie was a proper location in 1879 or 1880, and, being so, whether the annual expenditure had been made thereon for the year 1881, as required by the statutes of the United States. If those questions should be solved by the jury in favor of Ferguson's Nellie, it would follow that the ground was not open for relocation in 1882, and the location thereof by Kell and Evans on the second day of January, 1882, established for them no interests in the same. If Kell's location was void by reason of having been made at a time

when the ground was not open to location, then the Copper Chief location of October 13, 1883, if properly made, would have priority over the Equator location made January 1, 1884. If, however, the annual assessment-work had not been done in 1881 on Ferguson's Nellie, the ground would have been open to relocation January 2, 1882, when Kell made his location; and if the annual expenditure for 1883 had not been made thereon, or if the owners thereof had not resumed work before the expiration of the year 1883, the ground would have been open to location on January 1, 1884, when the Jordans made a location of the Equator claim; and it would then become material as to whether the owner of Kell's Nellie had, in fact, resumed work upon that claim before the expiration of the year 1883, and pursued it to a final completion, or to the extent of one hundred dollars required by the statute.

The jury solved the question in favor of appellees, and in favor of the Copper Chief claim, as follows: "We, the jury, find the issues herein joined for the defendants; and we further find that they have established a right and title to, and are entitled to the possession and occupancy of, the premises in controversy, by reason of full compliance with the acts of Congress and the laws of the territory of Arizona relating thereto." This verdict is in harmony with the instruction given the jury by the court at the request of appellants, which is as follows, to wit: "If you find that neither the said Nellie location of December 20, 1879, nor the said Nellie location of February 26, 1880, was a good and valid location, then you are instructed that the ground covered by such attempted locations was open to location and entry on January 2, 1882, and that the same was subject to be relocated by any citizen of the United States. And if you further find that on said 2d day of January, 1882, one G. V. Kell did make a valid location of said ground, or any part thereof, which embraced the ground in dispute in this action, then you are further instructed that the attempted location on the same ground by the defendant Ferguson in 1883, as the Copper Chief location, was void. . . . So, then, if you find that the Nellie location of 1879 or of February 26, 1880, was valid, but that the same became forfeited for the non-performance of annual work for the years 1880 and 1881, and you further find that the Kell location of the Nellie in 1882 was valid, then, and in that

event, also, you will find that the Copper Chief location of the defendant Ferguson was void, so far as the ground in dispute in this action is concerned, for the reason that, if the Kell location of the Nellie in 1882 was valid, then the ground within the limits of that location was not subject to location or appropriation by another until after the expiration of the year 1883." The jury having resolved the facts in favor of appellees and the Copper Chief settles the rights to the disputed ground under the law, and the judgment rendered thereon must stand, unless there can be shown some error of the court in directing the issues, or the introduction or rejection of evidence, or the instructions to the jury. It is not pretended that there is not sufficient evidence to support the verdict of the jury. Therefore, nothing is before us to decide but the correctness of the rulings of the court during the trial of the cause, and of the instructions given to the jury or asked or refused.

2. Appellants have made numerous assignments of error and specifications under such assignments, some of which are insisted upon in the brief. An examination of all of them becomes unnecessary, inasmuch as the verdict of the jury was in support of the Copper Chief location. The jury were at liberty to have rendered one of three verdicts: First, for the appellants, supporting the Equator claim; second, for the appellees, supporting the Copper chief; and third, for the government, supporting neither the Equator nor the Copper Chief claims. Had the appellees, as defendants in the district court, gone to trial the second time, as they did the first time, upon a general denial only, the whole issue would have been only as to the validity of the Equator claim, and the right of the owners thereof to maintain the same against the government; but appellees having amended their answer, and set up a claim within themselves to the Copper Chief, the issue became then one between the Equator claim and the government, between the Copper Chief claim and the government, and between the Copper Chief claim and the Equator claim.

Much of the evidence in such contests is an aim by either party, first, to maintain his own right, or, failing in that, to destroy the right of his adversary, as against the government; and much of the evidence in this case given by both parties

and many instructions offered had relation to the destruction of the adversary's rights rather than to the maintenance of their own. Had the verdict of the jury been for the government, and that neither the plaintiffs nor defendants had established their rights or title to the ground in controversy, by reason of the fact that neither had complied with the acts of Congress and the laws of the territory, then it would have been necessary to have examined many of the errors complained of with reference to the introduction or rejection of the evidence and the instructions given and refused; then much of such evidence and instructions would have been pertinent to the issues as to whether the Equator was a valid location as against the location which was made by Kell and Evans, known as "Kell's Nellie."

One of the assignments insisted upon is that of permitting Schuerman to be added as a party defendant, and allowing him to introduce in evidence his amended location to the Copper Chief mining claim. We have not been able to see the necessity of adding Schuerman as a party. The cross-complaint could have been prosecuted and the action defended by Duke & Ferguson as well without as with him; or he might under the statutes of Arizona have been substituted for them. Paragraph 725 of the Revised Statutes of Arizona, after providing for the continuance of causes by or against the representative of deceased persons or their successor in interest, provides: "In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." But how were the appellants affected by the action of the court in allowing Schuerman to be added as a party, and in what way were their interests prejudiced?

The jury, finding for the Copper Chief mining claim, necessarily found that Ferguson made a location of the Nellie mining claim in 1879 or 1880; that the annual assessment or representative work was done thereon in 1881; that the ground was not open to location at the time Kell undertook to make the location on January 2, 1882; and that consequently the Copper Chief claim being located in October, 1883, prior to the location of the Equator, in January, 1884, made the Copper Chief a subsisting and existing mining claim

from October 18, 1883. The only pretense that the appellants could make that they had been injured by the admission of Schuerman as a party was that which might result from the introduction of his amended location of the Copper Chief, made on the 31st of August, 1896. That amended location notice did not inaugurate any new rights. It had relation to the original location, made October 18, 1883. In the amended location notice Schuerman says "that it was originally located October 18, 1883, by Ferguson, and that he makes this further amended certificate of location without any waiver of any previous acquired rights by said original locator, but for the purpose of correcting any errors in the original location or description of record thereof." No serious contest was made by appellants to show that the Copper Chief claim was an invalid location in any other way or from any other reason than that the ground at the time the location was made was not open to location by virtue of the location of the Nellie claim by Kell and Evans in 1882. No special point is made by them that the acts performed by the locator were insufficient to make a location of a mining claim. They make no pretense that they were not aware of the location of the ground either by Ferguson or by Kell. Prior to the act of the legislative assembly of Arizona approved March 20, 1895, there was no penalty attached to a failure to record a location notice. The law of the territory prior to that time regulating the recording of location notices was in effect but a registration act. Location certificates recorded under it simply imparted constructive notice as any other registration act. So the amended location notice and certificate of location of Schuerman in August, 1896, gave him no new rights, and the introduction of it before the jury, although useless, was harmless.

3. Appellants assign as error the admission of the map and model in evidence. The map was prepared by an engineer (Powers) who was upon the ground and took the bearings and distances of certain monuments in relation to each other and to other objects, as they were pointed out to him by the locator Ferguson. From his field-notes he made the maps which were in evidence. Appellants insist that before a map can be admitted in evidence it must be proved to be correct. That is not always the case. If it is to be used in evidence as

a substantive and independent piece of evidence, the appellants are correct, but if it is only to be used as an illustration of what the witness details, no such proof is necessary; but in this instance the maps were proven to be correct representations of the lines connecting the objects pointed out to the surveyor by Ferguson. It is not necessary that the map should be able to stand the tests of Ferguson's evidence as to the particular monuments being the correct monuments of the locations testified to by him. The maps were used in connection with the evidence of witnesses that they might show to the jury that which they were endeavoring by words to explain; and being used for that purpose, the practice is too common in *nisi prius* courts and too well-settled by appellate courts to meet with anything but our approval.

4. Inasmuch as the jury rendered a verdict supporting the Copper Chief claim, it will not be necessary for us to look into the evidence in regard to the acts performed to make the location of Kell's Nellie or the validity of that location certificate; neither will it be necessary to discuss the acts of location of the Equator or its certificate of location. The vast volume of evidence, the vast number of instructions asked, and the multitude of errors assigned, have relation to the conflict between Kell's Nellie and the Equator, all of which would have been important to have been considered had the verdict been in favor of the government, as we have before indicated; but appellants insist upon one class of errors with so much strength that, probably, it will not be improper for us, if not incumbent upon us, to give the matter some consideration, and that is, as to the law of resumption of annual expenditure or representation work on a claim before the year expires, when the work has not been completed for that year, or, further, where the work had not been attempted until the very last day of the year, and at a time when the owners of a claim about to be permitted to go derelict have entered upon the ground to make the annual expenditure.

It is in evidence that on the last day of the year 1883 the Jordans went upon the ground in dispute for the purpose of being there early on the following morning to make a location of the ground; that they there found some of the owners of Kell's Nellie, who on that day did some little work, probably insignificant in amount, yet who declared at the time

that they were there for the purpose of assuming possession of the mine and completing the work to represent it for the year 1883; that they did continue the work for five or six days following the last day of December, 1883, until they had made an expenditure on the Nellie to the amount of about sixty dollars, when they went away and never returned.

On the morning of January 1, 1884, and some time before eight o'clock on that day, the Jordans completed the monuments for the Equator and posted their notices, and did such acts, let us say without comment or investigation, as would give them a valid location to any unoccupied ground; and they now insist that the owners of the Nellie having abandoned their claim after they had performed only the amount of sixty dollars' worth of work, it became forfeited, and their location of the Equator related back to the 1st of January. We do not so understand the law. Since the case of *Belk v. Meagher*, 104 U. S. 279, and the multitude of cases following it, it has become a settled law that if the work be not completed on a mining claim in any part of the year in which the statute requires it to be done, but the owners thereof are upon the ground for the purpose of doing the work before the year expires, and then prosecute the work to completion, the work so prosecuted will have relation to the year in which it should have been done, and that such resumption will prevent the claim from being forfeited. Such resumption effectually prevents it from becoming forfeited, and no forfeiture can take place until after there is a failure to prosecute the work, after the same has been resumed. It is also well settled that until a claim has been abandoned or has been forfeited, no other location can be made of the ground. The decisions go so far as to make it a settled law that if the first locator resumes work at any time, even after the expiration of the year, but before other rights attach in favor of relocators, he preserves his claim.

If this be the law, how can the appellants be heard to maintain that their location of the Equator is a valid one? By their own evidence, and by all the undisputed evidence in the case, had Kell's Nellie been a proper location, which the Equator people made strenuous efforts to prove, yet that claim (Kell's Nellie) did not become forfeited nor the ground become open to relocation, until after the owners had quit

work, at the expiration of the fifth or sixth day following the last day of December, 1883. There is no such thing as making a location of ground not open to relocation by reason of being already located, and then, because of failure on the part of the owners to support that claim either by abandonment or forfeiture, have the relocation relate back to the original act. In the location of mining claims there is no such thing as relation of acts, except such amendments as may take place in support of an original valid location. We would not be understood to say that a party, after once having resumed the work, can fitfully perform it, and pursue a portion of it at one time, quit and go away, and then come and resume again, so as to take all of the following year to do the work which was necessary to be done for the year previous. But we do say that having resumed work, they must pursue it to completion; and if they do not pursue it to completion, but leave the ground, it will then become forfeited, and not before. But if work is resumed before the expiration of the year, or before any interests have intervened, no forfeiture can occur until the work is abandoned. When owners resume work, they must perform all that it would have been necessary for them to have performed in the previous year, in order to prevent a forfeiture. Hence, under any view of this case, we cannot see how the appellants could have obtained a verdict from the jury or maintained their rights to the Equator claim against the government, or against any locators, whether it be of the Copper Chief or Kell's Nellie or Ferguson's Nellie. The judgment of the district court is affirmed.

Sloan, J., Doan, J., and Davis, J., concur.

[Civil No. 591. Filed April 16, 1898.]

[52 Pac. 1122.]

THOMAS WAGNER et al., Defendants and Appellants, v.
C. E. BOYCE, Plaintiff and Appellee.

1. JUDGMENT ON PLEADINGS, WHEN PROPER—MOTION FOR EQUIVALENT TO DEMURRER TO THE ANSWER.—When any defense has been pleaded, unless the pleadings show a clear right for recovery on the part of the plaintiff, after giving due weight to the defense presented in the answer, the plaintiff is not entitled to judgment on the plead-

ings; and in that sense a motion for judgment on the pleadings is equivalent to a demurrer to the answer.

2. PLEADING—STATUTE OF LIMITATIONS—REV. STATS. ARIZ. 1887, PAR. 2328, CONSTRUED—DEMURRER—ANSWER, WHEN PROPER.—Under paragraph 2328, *supra*, providing that the laws of limitation shall not be made available unless it be specially set forth as defense in the answer where the bar of limitations appears on the face of the pleadings it can be pleaded by demurrer. In cases where the bar exists as a matter of fact, but is not shown on the face of the complaint, and must be established by evidence *aliunde*, the statute must be pleaded by way of answer. A demurrer is considered for such purpose an answer to that extent, and thus is reconciled to the requirements of the above statute.
3. SAME—ANSWER—CONSTRUCTION.—A pleading called an answer which has in it the elements that constitute an answer rather than a demurrer will be treated as such although worded in part after the manner of a plea by demurrer.
4. SAME—SAME—STATUTE OF LIMITATIONS—SUFFICIENCY.—Allegations contained in an answer setting up the bar of the statute of limitations, "That at all times since the said seventh day of October, 1893, the defendants have been within the territory of Arizona, and have been under no disability that would suspend the statute of limitations," are material allegations of fact, that entitle the defendants to support them by evidence in the trial of the case.
5. SAME—SAME—SAME—NECESSITY FOR VERIFICATION—REV. STATS. ARIZ. 1887, PAR. 735, SUBD. 11, AND PAR. 1880, CITED AND CONSTRUED.—An unverified answer pleading the bar of the statute of limitations to a verified complaint setting up an open account is not within the provisions of paragraph 735, subdivision 11, or paragraph 1880, *supra*, requiring a verified answer, for the reason that such answer does not deny the account or any item thereof.
6. JUDGMENT ON PLEADINGS—STATUTE OF LIMITATIONS—SUFFICIENCY OF ANSWER—REV. STATS. ARIZ. 1887, PARS. 2311, 2312, CITED AND CONSTRUED.—Paragraph 2311, *supra*, provides that actions upon open accounts shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterwards; and paragraph 2312, *supra*, provides that the limitation shall run against each item from the date of delivery, unless otherwise specifically directed. Where the complaint in an action upon an open account contains an itemized statement showing the dates of delivery of the several items, and the answer alleges the entire account, including the very last item charged to be beyond the prescribed limitation of time, and sets up the bar of the statute, it is error to render judgment for the plaintiff on the pleadings.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Owen T. Rouse, Judge. Reversed.

The facts are stated in the opinion.

E. S. Clark, for Appellants.

Herndon & Norris, for Appellee.

DOAN, J.—This is an appeal from the judgment rendered during the March term, 1897, of the district court of Coconino County in an action for debt arising upon an open account between merchant and customers. It was tried in the court below on a motion by the plaintiff for a judgment on the pleadings. The appellee filed his action in the court below on the fourth day of December, 1896, in which he complained of the defendants, and alleged: "That the defendants are indebted to the plaintiff in the sum of \$465.98, which he claims, with interest from the 16th day of April, 1894, upon an open account for certain goods, wares, and merchandise sold and delivered by the plaintiff to the defendants, at their request, between the 4th day of February, 1893, and the 16th day of April, 1894. An itemized statement of said goods, wares, and merchandise so furnished, duly verified, is hereto attached, and marked 'Exhibit A,' and made a part of this complaint. That the defendants have not paid the said sum, nor any part thereof, although often requested so to do. Wherefore plaintiff prays judgment in the sum of \$465.98, with interest from the 16th day of April, 1894, and costs of suit." To this complaint, and made a part thereof, is attached, as Exhibit A, an itemized account or bill of particulars, setting forth the various items sued for, with the dates when sold by plaintiff and delivered to defendants, the first item being dated February 4, 1893, and the last item being dated October 7, 1893, the total amount charged being \$508.06. Following these debits appear five several credits, dated from February 16, 1893, to June 16, 1894, aggregating \$42.08, which, being deducted from the total amount charged, leaves the amount sued for \$465.98. This account is verified by the following affidavit: "C. E. Boyce, being duly sworn, deposes and says that the above account is, within his knowledge, just and true; that it is due; that all just and lawful offsets, payments, and credits have been allowed." (Signed and sworn to.) The defendants answered as follows: "Come now the

defendants above named, and, for answer to plaintiff's complaint on file herein, say, first, that it appears on the face of plaintiff's complaint, and defendants so allege the fact to be, that plaintiff's said suit was not commenced within three years after his said cause of action had accrued; that the last item charged against defendants in the account upon which plaintiff bases his action was delivered on the 7th day of October, 1893, and the said action was not commenced until the 4th of December, 1896; and that defendants at all times since the said 7th day of October, 1893, have been within the territory of Arizona, and have been under no disability that would suspend the statute of limitations. Wherefore defendants pray judgment that said action be adjudged to be barred by the statute of limitations, and that defendants recover their costs herein." The cause came on for trial in the district court on motion by plaintiff for judgment on the pleadings, and the court rendered judgment on the pleadings, as prayed for in said motion, in the sum of \$465.98, with interest thereon from the 16th day of June, 1894, from which judgment, and the order denying a new trial, the defendants appealed, and assigned as error "that the court erred in rendering judgment for plaintiff on the pleadings, and in holding the plaintiff's action was not barred by the statute of limitations."

The first point raised by the appellants is, that the court erred in giving judgment on the pleadings, founded upon the legal proposition that when any defense has been pleaded, unless the nature of the pleadings show a clear right for recovery on the part of the plaintiff, after giving due weight to the defense presented in the answer, the plaintiff is not entitled to judgment on the pleadings; and in that sense a motion for judgment on the pleadings is equivalent to a demurrer to the answer. In this instance the district court seems to have gone upon the supposition that the plea of limitation was raised by demurrer. The only ground on which the judgment of the district court could be sustained is, that instead of passing upon the merits of the plea of limitation, it passed upon the sufficiency of the pleading; that rather than adjudging that the limitation would not run against the account, if properly pleaded, the decision was rendered upon the validity of this plea of the statute of limitations by way

of demurrer, and decided against the validity of the plea, because of the fact that the bar did not appear in the face of the pleadings,—a theory that would be supported by the fact that the complaint itself gave the dates from February 4, 1893, to the sixteenth day of April, 1894, and it was only the verified account attached thereto which gave the last date of the account as October 7, 1893,—a date clearly subject to the bar of the statute. Our statutes provide (Rev. Stats., par. 2328) that “the laws of limitation in this territory shall not be made available to any citizen in any suit in any of the courts of this territory unless it be specially set forth as defense in his answer.” In accordance therewith, it has been contended that the statute of limitations cannot be pleaded by demurrer, but must, because of the requirements of this statute, be pleaded by way of answer. The better opinion, however, in the courts, under our code practice, seems to be that, where the bar of limitations appears on the face of the pleadings, it can be pleaded by demurrer, but in cases where the bar exists as a matter of fact, but is not shown in the face of the complaint, and must be established by evidence *aliunde*, the statute must be pleaded by way of answer, and is reconciled to the requirements of the statute above quoted on the theory that in the contemplation of our code a demurrer is considered for such purpose an answer, to that extent. An examination of the pleadings in this case, however, discloses the fact that the bar of the limitation was raised by answer, and not by demurrer. That being the case, it is immaterial whether the bar of the statute was apparent in the plaintiff’s pleadings or not. The records show that the defendants filed their answer as follows: “Come now the defendants above named, and, for answer to plaintiff’s complaint on file herein, say that it appears on the face of plaintiff’s complaint, and defendants so allege the fact to be, that plaintiff’s said suit was not commenced within three years after his cause of action had accrued; that the last item charged against defendants in the account upon which plaintiff based his action was delivered on the 7th day of October, 1893, and the said action was not commenced until the 4th day of December, 1896; and that defendants at all times since the said 7th day of October, 1893, have been within the territory of Arizona, and have been under no disability that would suspend the statute of limita-

tions. Wherefore defendants pray judgment that the said action be adjudged to be barred by the statute of limitations, and the defendants recover their costs herein." This is plainly and distinctly an answer, in every sense of the word. It is called an answer in the pleadings, and has in it the elements that constitute an answer rather than a demurrer. While it is true that the first part of the first paragraph of the answer is worded after the manner of a plea by demurrer, and the allegation "that it appears on the face of the complaint" is made, which is unnecessary, and the further allegation "that plaintiff's suit was not commenced within three years after his said cause of action had accrued," might be construed to be a statement of a conclusion of law, rather than a statement of fact, if those two expressions are excluded, as surplusage, there still remains enough to constitute a sufficient answer in the statement, "Defendants so allege the fact to be, that the last item charged against defendants in the account on which plaintiff bases his action was delivered on the 7th day of October, 1893, and the said action was not commenced until the 4th day of December, 1896." These are allegations of facts,—the one fact relative to the date of the last item, and the other fact alleged relative to the date of commencement of the action. They possess the essential elements of an answer in pleading, and they entitle the defendants to an opportunity in court to establish them by evidence. The further allegations contained in the answer, "that at all times since the said 7th day of October, 1893, the defendants have been within the territory of Arizona, and have been under no disability that would suspend the statute of limitations," are likewise allegations of fact material to the issue, that entitle the defendants to an opportunity to support them by evidence in the trial of the case before judgment shall be rendered against them. And it is because of these facts thus alleged in the answer that "defendants pray judgment that said action be adjudged to be barred by the statute of limitations." If this answer was properly before the court, it was error on the part of the court to give a judgment on the pleadings, unless the facts thus alleged would have been insufficient to have defeated a judgment for the plaintiff. The two points, therefore, upon which the case would turn, are: First, was this answer properly before the court? and second, were

the facts alleged sufficient, if established, to defeat the cause of action?

On the first point it is objected by the appellee's counsel that there was no verified answer before the court, basing their objection upon the requirement in the Revised Statutes (par. 735): "That any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit." Subdivision 11: "That an account which is the foundation of the plaintiff's action and supported by an affidavit is not just, and in such case the answer shall set forth the items and particulars which are unjust." They have cited also in support of their view paragraph 1880, which is very similar to the foregoing, and reads: "When any action or defense is founded upon an open account supported by affidavit to the effect that such account is just and true, that it is due, the same shall be taken as *prima facie* evidence thereof unless the defendant shall at least one day before the trial file a written denial under oath, stating that such account is not just or true in whole or in part. Where he fails to file such affidavit, he shall not be permitted to deny the account or any item therein, as the case may be." This objection does not raise any material issue, for the reason that in this instance the defendants have not denied the account, or any item therein. He has not attacked the truth or correctness of the items or questioned the indebtedness therefor, but has simply raised the bar of the statute of limitations, which does not attack or deny the account in any manner whatever, but simply leaves the plaintiff without the remedy of a judgment by which to enforce the collection of the indebtedness incurred thereunder. This pleading does not come within the prohibitive paragraphs cited, but, allowing the *prima facie* case already made by the plaintiff's verified account to stand unassailed, it goes on to set up a defense that is entirely consistent with the truth and correctness of the account, and that will defeat the judgment, notwithstanding the evidence thus admitted to be true. For this purpose the defendants were entitled to file their unverified pleading; and if the facts alleged in this unverified answer were sufficient, if established, to defeat the plaintiff's recovery, the court erred in rendering judgment for the plaintiff on the pleadings.

The answer alleged "that the last item charged against

defendants in the account upon which plaintiff bases his action was delivered on the 7th day of October, 1893, and the said action was not commenced until the 4th day of December, 1896, and that defendants at all times since the said 7th day of October, 1893, have been within the territory of Arizona, and have been under no disability that would suspend the statute of limitations." The Revised Statutes of Arizona (par. 2311) provides: "There shall be commenced and prosecuted within three years after the cause of action shall have accrued and not afterwards all actions upon stated or open accounts other than such mutual and current account as concern the trade of merchandise and between merchant and merchant, their factors and agents." Paragraph 2312: "In all accounts except those between merchant and merchant, as aforesaid, their factors and agents, the respective times and dates of delivery of the several items charged shall, after demand made in writing, be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specifically directed." That was done in this instance without demand in writing: There is no claim that any contract whatever was made affecting the question of limitation. The answer alleges the entire account, including the very last item charged, to be beyond the prescribed limitation of time, and sets up the bar of the statute. The establishment of this fact by the itemized statement verified by affidavit, and attached to the complaint, was unnecessary to decide the question at issue, because whether the facts were established or not does not affect the proposition that, with the facts alleged, and the statute pleaded, it was error on the part of the district court to render judgment for the plaintiff on the pleadings, and by that means preclude the defendants from the opportunity of sustaining by evidence the allegation in their answer. The judgment of the district court is therefore reversed and the case remanded.

Street, C. J., Davis, J., and Sloan, J., concur.

[Civil No. 610. Filed June 11, 1898.]

[53 Pac. 579.]

F. E. JORDAN et al., Plaintiffs and Appellants, v. GEORGE H. SCHUERMAN, Defendant and Appellee.

1. CONTINUANCE—AMENDED PLEADINGS — SURPRISE — GRANTING DISCRETIONARY—SIMILAR ACTION BETWEEN SAME PARTIES REPRESENTED BY SAME ATTORNEY AND INVOLVING MUCH OF THE EVIDENCE IN THE PRESENT CASE.—The refusal of the trial court to grant a continuance upon the motion of plaintiffs and appellants alleging surprise and inability to proceed with the trial in an action to quiet title to mining ground because of the filing of an amended answer setting up the location of two claims which, if established, would render plaintiffs' location void, is discretionary, and will not be reviewed, where it appears that the parties and attorneys were identical with those in a similar action, tried but a few months before, wherein a large part of the evidence affecting the present case was introduced.
2. MINES AND MINING—AMENDED LOCATION NOTICE—DOES NOT GIVE NEW RIGHTS—JORDAN v. DUKE, ANTE, P. 55, FOLLOWED—EVIDENCE ADMISSIBLE—EXCEPT AS TO INTERVENING RIGHTS.—An amended location notice does not inaugurate any new rights, it having relation to the original location (*Jordan v. Duke, supra*, followed); and the introduction of such amended location notice is permissible, except as against the rights of parties which have accrued between the time of the original location and the amended location.
3. SAME—SAME—EVIDENCE—NONE THAT ORIGINAL LOCATION WAS INVALID.—The making of an amended location is no proof that the original location was invalid.
4. SAME—LOCATION NOTICE—EVIDENCE—PRIMA FACIE AS TO ACTS RECITED AS HAVING BEEN DONE.—A location certificate is under the laws of this territory *prima facie* evidence that the acts set out therein have been performed by the locators of the claim.
5. APPEAL AND ERROR—REVIEW—EVIDENCE — SUFFICIENCY — MUST BE GRAVE ERRORS IN RULINGS TO REVERSE.—Where the evidence supports the verdict, this court will not disturb a judgment thereon, unless there be grave errors in the rulings of the trial court.

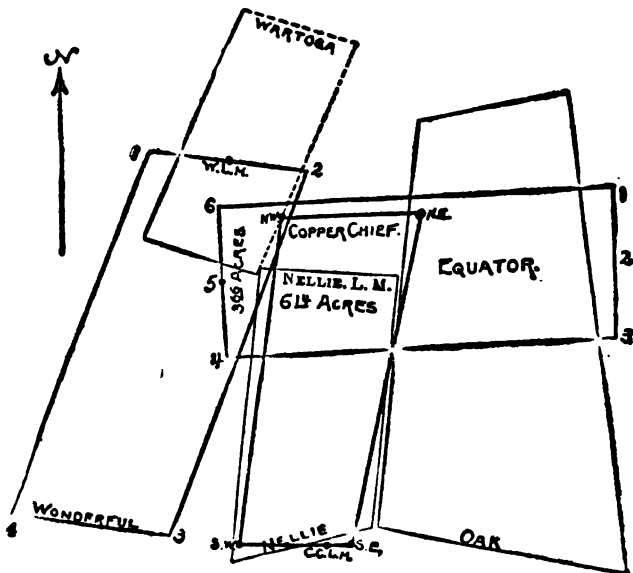
APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

F. E. Corbett, Herndon & Norris, and John J. Hawkins, for Appellants.

T. W. Johnston, W. H. Barnes, and Franklin E. Brooks, for Appellee.

STREET, C. J.—The appellee, George H. Schuerman, filed in the land office at Prescott, Arizona, on the thirtieth day of April, 1895, an application for patent to a certain mining claim in Verde Mining District, Yavapai County, Arizona, called the "Wonderful." On the third day of August, 1895, and within the period of sixty days of publication of application, appellants filed in said land office their contest to said application for patent to said Wonderful mining claim, on the ground that 3.66 acres of land embraced in the Wonderful mining claim was the property of appellants, and within the limits of a certain mining claim belonging to them, called the Equator. Upon the filing of said contest the usual order was made in the land office stopping all further proceedings until the rights of the parties to that portion of said mining claim in contest could be ascertained by a court of competent jurisdiction.



Appellants thereafter instituted this suit against appellee, claiming title to, and the right of possession of, 3.66 acres of land embraced within the Wonderful mining claim, as well as within the Equator mining claim, as shown by a diagram

accompanying this opinion, by virtue of said Equator location made on the first day of January, 1884.

The action of appellants against appellee is in the nature of a suit to quiet title, under the provisions of paragraph 3132 of the Revised Statutes of Arizona, approved March 17, 1891, which reads as follows: "An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against another who claims an estate or interest adverse to him." Within the time for answering such complaint the defendant, Schuerman, filed a general denial; and afterwards, on the twenty-third day of August, 1897, one day before the cause was called for trial, filed an amended answer and cross-complaint, setting up title to the land in dispute by virtue of the said Wonderful mining location made on the eighteenth day of October, 1883, and asked that his title thereto be quieted against the claim of appellants. Defendant further alleged in his answer that at a date less than sixty days prior to the eleventh day of November, 1896, being the owner of the Wonderful lode, and in possession thereof, he made an amended location thereof, and did on the tenth day of December, 1896, cause to be recorded in the office of the county recorder a certificate of such amended location, all of which was done in accordance with the laws of the territory of Arizona and the statutes of the United States. Defendant, as a further defense to plaintiffs' complaint, alleged that on the seventeenth day of October, 1883, the Copper Chief mining claim was located, and that on the first day of January, 1884, it was a good and valid subsisting mining claim; and all the acts done or attempted in the location of the Equator claim were done and performed within the limits and upon the territory of the said Copper Chief mining claim; and that therefore the Equator location was void.

The contest between these parties in reference to the Copper Chief and Equator claims, or the conflict of territory amounting to 6.14 acres of land in common to those two claims, was decided by this court at the present term, and is reported in *Jordan v. Duke*, ante, p. 55, 53 Pac. 197.

By reference to the diagram accompanying this opinion, which is identical with the diagram accompanying that opinion, it will be seen that the Copper Chief and Wonderful loca-

tions lie virtually parallel to each other, and practically at right angles to the Equator claim, and it will also be seen what ground is in dispute in each contest. The dispute as to the ground in contest in this action is of a similar nature to the dispute in the case referred to between the Equator and the Copper Chief, and, as in that case, arises upon priority of location,—in that case, priority of location between the Copper Chief and the Equator; in this case, between the Wonderful and the Equator. A portion of the ground in dispute is within the surface lines of a mining claim located in December, 1879, by W. H. Ferguson in the name of G. V. Kell, James Biddle, and O. B. Wilcox, called the "Wartoga," which, because of some supposed defects in the location, was relocated by the same locator in the name of the same claimants in February, 1880. G. V. Kell, under the theory that the annual expenditure had not been made on the Wartoga in 1880 or 1881, performed acts of relocation of that claim on the second day of January, 1882. On the eighteenth day of October, 1883, Ferguson, ignoring the attempted location of Kell, made on January 2, 1882, and claiming that the annual expenditure had been performed on the Wartoga for the year 1881, but not for the year 1882 or 1883, made acts of location of ground largely within the line of the Wartoga location, and also of considerable ground outside, under the name of the Wonderful, including the ground in dispute, and claimed by appellee. Appellants claim the ground by virtue of the Equator location made January 1, 1884.

The questions submitted to the jury became narrowed to almost the single question whether the annual expenditure had been made on the Wartoga located by Ferguson for the year 1881. If it had been done, and the jury should so find, as they of necessity must find in rendering their verdict for appellee, the same result would be arrived at which was reached in the case of *Jordan v. Duke*, ante, p. 55, already referred to in the contest between the Copper Chief and the Equator, decided by the court at the present term, and reported in 6 Ariz. 55, 53 Pac. 197; and the reasoning there used by the court would as to similar facts be pertinent to the circumstances, conditions, and law of this case.

One of the assignments of error which appellants insist upon with vigor is, that the court refused to grant a continuance of

the trial of the cause upon their affidavit that the amended answer of appellee, setting up the location of the Wartoga and the Copper Chief claims, had taken them by surprise, and that they were not ready to proceed to trial. When we take into consideration the fact that the cause of *Jordan v. Duke*, heretofore referred to, had but a few months before been tried, and that the parties in this action were identical with the parties in that action; that, in the trial of that cause in the district court, a large body of the evidence had relation to all claims covered by any portion of the location of the Equator, including the Wartoga, the Wonderful, the Nellie, the Copper Chief, the Oak, and the Equator itself; and that evidence had also been considered as to the performance of the annual expenditure on all of said mines,—it seems impossible that these parties or their attorneys, who are the same in this cause as in the case between the Equator and the Copper Chief, could be surprised by appellee setting up any matters in relation to any of these locations. The granting or refusing a continuance is a matter within the discretion of the trial judge, and we cannot think that the rights of appellants have been in the least affected by the refusal of the trial judge to grant such continuance.

Appellants further insist upon their assignment of error in relation to the amended notice which appellee made of the Wonderful mining claim. Substantially the same question arose between these parties in the contest between the Equator and the Copper Chief, wherein the appellee, Schuerman, was added as a party defendant, and allowed to introduce evidence in regard to the amended location notice of the Copper Chief mining claim. We there said that the amended location notice did not inaugurate any new rights; it had relation to the original location. In contests of this nature there is always the struggle, first, to show that the adversary has no right to claim the ground against the other claimants; and each claimant seeks to obtain such a verdict as may enable him to obtain a patent from the government of the United States. And in this case the issue is of a three-ply nature—first, one between the Equator claim and the government; second, between the Wonderful claim and the government; third, between the Equator claim and the Wonderful claim.

It was perfectly legitimate to introduce evidence of the

amended location, except as against the rights of parties which have accrued between the time of the original location and the amended location. An instruction covering that point and protecting the appellants was given by the court as follows, to wit: "If you should find from the evidence that neither the original Wonderful location, nor the location of the Equator, was valid, but should find from the evidence that on the eleventh day of November, 1896, George H. Schuerman was the owner of the Wonderful lode, and should further find that on said date he made a valid location thereof, as hereinbefore defined, then the court instructs you that, in law, the said amended location dates back to the original location of the said Wonderful claim by W. H. Ferguson, October 17, 1883, and you should find for the defendant, unless you find that legal rights of the plaintiffs or other persons have intervened and become vested between October 17, 1883, and November 11, 1896. . . . You are further instructed that making such an amended location is no proof that the original location was not valid; and are also instructed that a location certificate is, under the laws of this territory, *prima facie* evidence that the acts set out in said amended location have been performed by the locators of the claim."

The balance of the assignments of error refers to the instructions of the court, all of which relate to the relocation of the Nellie claim, and to the resumption of work on Kell's Nellie at the time the Equator claim was located, all of which matters have been heretofore adjudicated between these parties and fully determined by this court in the case of *Jordan v. Duke*, ante, p. 55, 53 Pac. 197, as hereinbefore mentioned.

The crucial point of contest between appellants and appellee was as to whether the annual expenditure had been performed on the Wartoga claim in 1881, which was determinative of the question whether the Wonderful claim was locatable in 1883. This point has been decided by the verdict of a jury in favor of appellee, under evidence so plain and substantial, and so satisfactory to this court, that this court feels it ought not to disturb a judgment on that verdict unless there could be discovered some grave error in the rulings of the trial court. We find none. So far as the record discloses the rulings of the court on the trial, we are not able to

say such error was committed as to prejudice appellants in their contest. The judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 618. Filed June 11, 1898.]

[53 Pac. 578.]

H. B. SCOTT, Defendant and Appellant, v. PATRICK T. HURLEY et al., Plaintiffs and Appellees.

1. **APPEAL AND ERROR—REVIEW—SCOPE.**—The refusal of the court to set aside the sheriff's sale of property under foreclosure will not be reviewed on an appeal from an order distributing and awarding the surplus received at such sale.
2. **SAME—RECORD—FAILURE TO PRESERVE ALL EVIDENCE—PRESUMPTIONS—SUFFICIENCY OF FINDINGS.**—Where the record fails to preserve all the evidence it must be presumed that the evidence was sufficient to support the findings, and where the findings fully support the order of distribution made by the court below it will be affirmed.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, and T. D. Bennett, for Appellant.

Thomas Armstrong, Jr., for Appellees.

DAVIS, J.—In an action to foreclose a mortgage upon real estate, the appellant, the appellees, and other persons claiming lien or interest therein were made parties defendant and duly served with process. Failing to answer, default was entered against them, and under a decree of foreclosure made in the case the mortgaged premises were sold for an amount which was \$2,510.03 in excess of the plaintiff's claim. This surplus was paid into court by the sheriff, whereupon the appellee P. T. Hurley filed an application in said action for

an order directing the payment to him of said surplus, claiming to be entitled thereto by virtue of his interest in said premises. Upon notice of said application, the appellant, H. B. Scott, and other defendants also appeared and respectively asserted claim to said fund. On a hearing to determine the rights and priorities of the several claimants to said fund the evidence introduced was principally documentary. The court made an order distributing and awarding said surplus to the appellees, P. T. Hurley and D. A. Tyrrell, and it is from this order that the appeal is taken. Two propositions of error are assigned. The first is predicated upon the refusal of the court to set aside the sheriff's sale of the property, and relates to a matter which is not before us for review, it plainly appearing from the record and bond that no appeal has been taken from any order of the court denying a motion or application to set aside the sale. The second proposition of error is the disallowance of the appellant's claim to said surplus fund and the distribution thereof to the appellees. The order of the lower court making disposition of said fund was based upon findings of fact, which are embodied in the record. An inspection of the record discloses that various matters of documentary evidence, referred to as having been introduced on the hearing in the court below, have not been brought to this court. It being manifest that there has been a failure to preserve all of the evidence, it must be presumed that the evidence before the lower court was sufficient to sustain the findings as made. These findings fully support and warrant the order of distribution which the court made, and the same is accordingly affirmed.

Street, C. J., Sloan, J., and Doan, J., concur.

[Civil No. 605. Filed June 11, 1898.]

[53 Pac. 588.]

THE LONDON, PARIS, AND AMERICAN BANK,
LIMITED, et al., Plaintiffs and Appellants, v. D. A.
ABRAMS et al., Defendants and Appellees.

1. APPEAL AND ERROR—INTERVENTION—ALLOWANCE DISCRETIONARY—
WILL NOT BE REVIEWED—REV. STATS. ARIZ. 1887, PAR. 656, CITED.
—Where plaintiffs and interveners are asserting claims to the same
fund in the hands of defendant, an order permitting such interven-
tion is a matter so entirely within the discretion of the trial court
that the exercise of that discretion cannot be reviewed here.
Statute, *supra*, cited.
2. ACTIONS—CONSOLIDATION OF—DISCRETIONARY—REV. STATS. ARIZ.
1887, PAR. 727, 918, CONSTRUED.—Where two suits are instituted
by different plaintiffs against the same defendant they are not
authorized to be consolidated by the literal construction of para-
graph 918, *supra*, providing for consolidation of suits “by the same
plaintiff against the same defendant” or “by the same plaintiff
against several defendants,” but where they relate to the same
subject-matter, and plaintiffs in one, on their own motion, become
interveners in the other, an order directing the cases to be tried
together was within the discretion conferred by paragraph 727,
supra, which provides that “the court may determine any con-
troversy between parties before it, when it can be done without
prejudice to the rights of others or by saving their rights; but
when a complete determination of the controversy cannot be had
without the presence of other parties the court shall order them
to be brought in.”
3. APPEAL AND ERROR—RECORD—REVIEW—EVIDENCE.—Where the muti-
lated, interlined, and disfigured transcript shows the evidence in
support of the appellants’ complaint to be meager, unsatisfactory,
and to a considerable extent incompetent, this court will not reverse
the judgment on the ground that it is not sustained by the evidence.

APPEAL from a judgment of the District Court of the
Third Judicial District in and for the County of Maricopa.
A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

J. M. Damron, and Joseph H. Kibbey, for Appellants.

Millay & Bennett, for Appellees.

DAVIS, J.—This is a consolidation of two separate actions originally instituted in the district court of Maricopa County, and tried therein as one cause. The London, Paris, and American Bank, Limited, et al., brought a suit (No. 2,769) against D. A. Abrams, as assignee of the Bank of Tempe, substantially alleging in their amended complaint, filed December 30, 1896, that between the seventeenth and twenty-second days of May, 1894, they intrusted to said bank for collection certain notes and claims, amounting in the aggregate to the sum of \$1,326.75; that the bank collected said notes and claims, commingled the proceeds thereof with its own funds, paid out the same in the usual course of its business, and failed to pay over any part thereof to the appellants; that at the time of making said collections the Bank of Tempe was insolvent, and knew the fact, and on the twenty-third day of May, 1894, made an assignment of all its real and personal property to the said D. A. Abrams, for the benefit of its creditors; that the said Abrams qualified and took possession of the assets of the bank, which consisted of \$53.15 in cash and other personal property; that the said assignee has converted the property so assigned to him into money, and now has in his hands, after paying all expenses of the administration of said trust, the sum of \$1,279.76; that the claims of these appellants have been duly presented to, and allowed by, said assignee, and payment demanded, but that payment thereof has been refused; that other creditors of said assignor bank have presented claims which have been allowed amounting to the sum of \$12,996.04. As further disclosed by the amended complaint, it was sought by those appellants who had joined as plaintiffs therein to have an equitable preference declared in their favor against the fund of \$1,279.76 remaining in the hands of the assignee, and to obtain an order for the payment to them of said residue, to the exclusion of all other creditors of said assignor. An answer was filed in the suit by the assignee, Abrams, simply alleging that the liabilities to the general creditors of said bank yet remained unpaid, that they were necessary parties, and asking that the suit abate. There was also filed an agreed statement of facts, signed by the counsel for plaintiffs and defendant. The record shows that subsequently, on January 6, 1897, leave was granted to R. B. Curley and other general creditors, claiming to represent \$6,104.04

of allowed claims, to intervene in said suit, and on January 8, 1897, their complaint in intervention was filed, in which they specifically deny all those facts alleged in the amended complaint upon which the plaintiffs rely for preference over the general creditors, deny that the fund in the hands of the assignee is impressed with any trust in favor of plaintiffs, and allege that the statement of facts was executed without their consent and against their interest, and that the same is untrue. There is a further averment that the assignee has been acting as such for the period of two years and eight months, during which time he has made no report whatever to the court; and the interveners ask that the assignee be required to make a full report of his administration of said trust, and, upon approval thereof, that he be ordered to distribute all funds remaining in his hands equally among all creditors, in proportion to their several claims. A demurrer and motion to this intervention were respectively overruled and denied. On January 9, 1897, the New York Life Insurance Company also commenced an action (No. 2,783) against D. A. Abrams, as assignee of the Bank of Tempe; its complaint making all necessary and formal averments, and charging that at the said company's request the said bank had on May 15, 1894, collected for it the sum of \$345.50, and failed to remit the same, and asking that said assignee be required to pay said amount out of the assets remaining in his hands. On the same day the assignee, Abrams, filed an answer to this complaint, admitting the allegations thereof, but alleging and setting forth in detail all other claims which had been presented to and allowed by him, that he was in doubt as to the manner in which he should distribute the assets of the insolvent bank, and asking the direction of the court therein. The record shows that on January 15, 1897, the London, Paris, and American Bank, Limited, and others (being the parties plaintiff in case No. 2,769) filed a motion in case No. 2,783, representing that they had an interest in the subject-matter of the latter action, and invoking permission to intervene and make a defense therein; that on January 25, 1897, the motion was allowed and said leave granted; and that on January 30, 1897, the said parties filed an answer in said case No. 2,783. The record further shows that by order of the court, made January 25, 1897, said causes Nos. 2,769 and

2,783 were directed to be consolidated and tried together; that they were so tried and submitted to the court on April 3, 1897, without the intervention of a jury, whereupon the court found that the plaintiffs in the said consolidated causes were not entitled to any preference over the interveners, the general creditors of the Bank of Tempe, nor over each other, and rendered judgment that the assignee make a complete report of his administration of said trust, and, upon the approval of his report by the court, that he distribute the funds remaining in his hands, *pro rata*, among all creditors of said bank, without any preference. From this judgment the plaintiffs in said consolidated causes are the appellants.

The questions presented by the record for our consideration are three: 1. Did the court err in permitting the general creditors to intervene in case No. 2,769? 2. Did the court err in its order directing that the two cases be consolidated and tried together? 3. Is the judgment sustained by the evidence?

Upon the first proposition we think there is manifestly but little ground for controversy. The Territorial Code of Civil Procedure provides that "any person who has an interest in the subject-matter of the suit which can be affected by the judgment may, on leave of the court or judge, intervene in such suit or proceeding at any time before the trial." Rev. Stats., par. 656. The plaintiffs and interveners were asserting claim to the same fund, and the matter was so entirely within the discretion of the court that the exercise of that discretion cannot be reviewed here.

The second question, we think, also involves a matter largely of the court's discretion. The two actions, it is true, are not such as are authorized to be consolidated, by the literal construction of paragraph 918 of the Revised Statutes. They are not suits "by the same plaintiff against the same defendant" nor "by the same plaintiff against several defendants." They are cases, however, which relate to the same subject-matter, and before trial, as the record shows, the plaintiffs in the one, upon their own motion, became interveners in the other. We consider that the order directing the cases to be tried together was fairly within the discretion conferred by paragraph 727 of the Revised Statutes, which provides that "the court may determine any controversy be-

tween parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in."

In the final proposition we can see no ground for reversal. An examination of the mutilated, interlined, and disfigured transcript shows the evidence in support of the material allegations of the appellants' complaints to be meager, unsatisfactory, and to a considerable extent incompetent. It may reasonably be questioned whether there is any proof whatever that the Bank of Tempe received these claims for collection, or that it made the collection thereof, or that the proceeds, if collected, were ever placed with the other funds of the bank. There is no testimony covering these points from any person who transmitted the claims or from any officer or employee of the bank. Only two witnesses were examined on the trial,—the assignee and his clerk. The former's testimony was limited to a statement that the latter had been attending to the details of the management of the property and assets of the bank. The testimony of the clerk, in so far as it related to material points, was vague, indefinite, and based solely upon entries found in books from the bank which had come into the assignee's possession. In this state of the evidence, we cannot say that the judgment is not sustained. We find no error in the record, and the judgment is affirmed.

Street, C. J., Sloan, J., and Doan, J., concur.

[Civil No. 607. Filed June 11, 1898.]

[53 Pac. 494.]

ALBERT STEINFELD, Plaintiff and Appellant, v. W. J. ROSS, Defendant and Appellee.

- 1. EJECTMENT — ANSWER — ADVERSE POSSESSION — ISSUES — TENANCY — EVIDENCE.**—Where the answer to a complaint in an action in the nature of ejectment is a plea of adverse possession, through title

in defendant, adverse to plaintiff, it is error for the court to instruct the jury to bring in a verdict for defendant upon the ground that under the evidence it was apparent that at the time the action was brought defendant was a tenant of plaintiff, the issue not being between landlord and tenant, and the only evidence of tenancy being the testimony of plaintiff that at one time defendant was his tenant, but that he had never received any rent and had not asked for any rent for more than two years.

2. SAME—OUSTER—EVIDENCE—DEFENDANT'S TITLE DEEDS—STATUTE OF LIMITATIONS—WHEN ADVERSE HOLDING COMMENCED.—Plaintiff in ejectment has a right to show the nature and time of the ouster by introducing the deeds under which defendant claims. Though the deed as dated might have been a bar to the action of plaintiff because of the statute of limitations, the date is not conclusive; the plaintiff having the right in connection therewith to have shown that he never knew of an adverse claim, and that none had been asserted until within a period not affected by the statute.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Reversed.

The facts are stated in the opinion.

Frank H. Hereford, for Appellant.

The deed from A. S. White to William J. Ross was rejected as evidence by the court. To use the language of the supreme court of the United States: "When the tenant disclaims to hold under his lease he becomes a trespasser, and his possession is adverse and is open to the action of his landlord as a possession acquired originally by wrong. This act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title, and the relation of landlord and tenant is dissolved, and each party is to stand upon his own right and the landlord can without notice sue for the possession of the premises." *Wilson v. Watkins*, 3 Pet. 43. See, also, *Sharpe v. Kelley*, 5 Denio, 433; *Bolton v. Landers*, 27 Cal. 104; *Smith v. Shaw*, 16 Cal. 88.

Therefore, the deed of A. S. White to the defendant became of the utmost importance in the case as showing in the strongest way known in our law the attempt of defendant to oust plaintiff and to initiate the very adverse claim of title

set up by defendant in two of his answers as defenses in this case.

Satterwhite & Lovell, for Appellee.

STREET, C. J.—Appellant brought an action in the district court in and for Pima County, in the nature of ejectment, to recover from appellee and defendant, W. J. Ross, part of lot 1 in the northeast quarter of section 11 of township 14 south, of range 13 east, known and described as the "White Place," alleging ouster to have taken place on the second day of March, 1890, and for damages for the detention. The defendant, Ross, made answer, and denied that plaintiff ever was the owner of any part of the land, and denied that plaintiff ever had any estate or interest in it, and alleged that he [the defendant] had been in possession thereof for more than five years, cultivating it, using it, and paying the taxes thereon, and claiming title thereto, under deeds duly registered, adversely to plaintiff and to all the world, and alleged that neither the plaintiff nor any person under whom plaintiff claimed ever had been seized or possessed of the premises described in the complaint within five years next prior to the commencement of this action, and alleged that plaintiff was barred by the statute of limitations from recovering, and claimed title in himself adverse to plaintiff. Plaintiff, to maintain the issue and show title in himself, introduced in evidence, first, a deed from the government of the United States to A. S. White, dated the 30th of March, 1882; second, a deed dated 22d of May, 1885, from Robert H. Paul, sheriff of Pima County, to T. L. Stiles, assignee of Hudson & Co., reciting a certain judgment of the district court of Pima County, entered the third day of October, 1884, in favor of Charles Hudson et al., against A. S. White, conveying all interest of said White in said land to Stiles; third, a deed dated June 24, 1887, from T. L. Stiles, assignee, to Leo Goldschmidt; fourth, a deed dated the twenty-ninth day of December, 1887, from Leo Goldschmidt to plaintiff, Albert Steinfeld; fifth, a further deed dated the tenth day of June, 1889, from Leo Goldschmidt to Albert Steinfeld; sixth, a deed dated the eleventh day of July, 1887, from A. S. White to W. G. Whorf, conveying to said Whorf whatever interest

he then had in the property; seventh, a deed dated January 3, 1889, from Whorf to William Zeckendorf, of whatever interest he (the said Whorf) had and acquired by virtue of said deed from A. S. White to him; eighth, a deed dated March 1, 1893, from William Zeckendorf to Albert Steinfeld.

Plaintiff then offered in evidence a quitclaim deed dated July 9, 1887, from A. S. White to the defendant, William J. Ross, to the introduction of which the defendant objected, on the ground that it was immaterial, incompetent, and irrelevant, and the court sustained the objection of the defendant. The plaintiff testified that Ross had occupied the property for some time, and was at one time his tenant; that he had never received any rent from Ross, and had not asked him for any rent for more than two years, which is all that was shown as to tenancy; whereupon the defendant asked from the court an instruction to the jury to bring in a verdict for the defendant upon the ground that under the evidence it was apparent that the defendant was the tenant of plaintiff at the time the action in ejectment was brought, which motion was granted by the court and an instruction given, and the verdict of the jury was returned accordingly. In this there was undoubted error. The issue was not between landlord and tenant. Under the answer of the defendant he was claiming upon notorious adverse possession, through title in himself, adverse to plaintiff. The statement by plaintiff that the defendant had at one time been treated as a tenant would be no reason for holding that the tenancy still existed in face of the answer of the defendant himself that he was holding the property under a title adverse to plaintiff. Under the condition of the testimony it was not only improper to assume that tenancy existed at the time of filing the complaint, and so instruct the jury, but a verdict for the defendant might properly have been set aside because of lack of evidence if the question had been submitted to a jury, and the jury had decided in favor of the defendant.

The court erred also in refusing to allow the offer of plaintiff's deed from A. S. White to William J. Ross, under date of July 9, 1887. The plaintiff in ejectment has a right to show the nature of the ouster and the time of the ouster; and one of the means of showing that is to show the titles under which defendant claimed. It is true, the title offered, being

of date July 9, 1887, might have been a bar to the action of plaintiff because of the statute of limitations; but the date of the deed is not conclusive of that fact. It would have been the right of plaintiff, in connection therewith, to have shown that the plaintiff never knew of such adverse claim of his tenant, and that defendant never asserted the same or pretended to hold under it until within a period not affected by the statute of limitations. The judgment of the district court is reversed and the cause remanded for a new trial.

Sloan, J., Doan, J., and Davis, J., concur.

[Civil No. 615. Filed June 11, 1898.]

[53 Pac. 577.]

BABBITT BROTHERS, and MAX SALZMAN, Defendants
and Appellants, v. **MANDELL BROTHERS & CO.,**
Plaintiffs and Appellees.

1. **ASSIGNMENTS FOR BENEFIT OF CREDITORS—FAILURE TO ANNEX INVENTORY—REV. STATS. ARIZ. 1887, PARS. 22, 23, AND 31, CONSTRUED—DOES NOT INVALIDATE ASSIGNMENT.**—A general assignment for the benefit of creditors shall be construed to pass his estate, whether particularly specified or not, and is not void for want of an inventory of the estate annexed thereto as provided by paragraph 23, *supra*, paragraph 31, *supra*, providing that no assignment shall be void for want of such inventory or list.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Mohave. J. J. Hawkins, Judge. Affirmed.

The facts are stated in the opinion.

Edward M. Doe, for Appellants.

Herndon & Norris, for Appellees.

DOAN, J.—This action was brought by the appellees in their own behalf and for other creditors of the defendant Kenyon in the district court of Mohave County to cause the

enforcement of a deed of assignment made by the said Kenyon for the benefit of his creditors. On the seventeenth day of February, 1896, H. S. Kenyon, engaged in the general merchandise business in Mohave County, was insolvent, and, contemplating insolvency, executed, acknowledged, and filed for record a deed of general assignment to one J. N. Cohenour, conveying to said Cohenour, as assignee, all of his property for the benefit of all of his creditors. Thereafter, on the eighteenth day of February, 1896, the said Kenyon executed a paper directing the recorder to cancel the filing of said deed of assignment, and on the said eighteenth day of February the said Kenyon executed and delivered to Babbitt Brothers a bill of sale purporting to transfer the stock of goods, wares, and merchandise that constituted the larger part of the property that had been included in and conveyed by the aforesaid deed of assignment. Babbitt Brothers and Salzman recorded said bill of sale on the said eighteenth day of February, 1896, took possession of the said stock of goods, and converted the same to their own use, without paying the value of said goods or any part thereof to the said assignee, or to any other person, for the benefit of said assigned estate. Thereafter the plaintiffs, Mandell Brothers & Co., creditors of said H. S. Kenyon, brought suit against him for their respective claims, and, having recovered judgments therefor, brought this action against Babbitt Brothers and Max Salzman for the value of the stock of goods thus taken and converted by them under the bill of sale, after the same had been transferred and conveyed by the deed of assignment. On the trial of the case in the district court, judgment was rendered in favor of the plaintiffs for fourteen hundred dollars, at which amount the value of the goods thus in controversy was established by the evidence introduced. The assignee mentioned in said deed of assignment having failed to qualify, one C. E. Bowers was appointed as special assignee and trustee to carry out the conditions of the trust created by said deed of assignment, and the defendants were ordered and decreed to pay the amount for which judgment was rendered into the hands of said special assignee for the benefit of the creditors of said Kenyon under the provisions of said deed of assignment. From this judgment of the court and the order denying a new trial the defendants appeal, and assign as error

the ruling of the district court in permitting the deed of assignment to be introduced in evidence to show conveyance of the property in question, and allege that said deed of assignment is an absolute nullity and conveyed nothing whatever.

The only objection raised to the validity of the deed of assignment and to its introduction as evidence is the fact that no schedule was annexed, and it is contended that the failure to so annex the schedule voided the deed. Our statutes provide (Rev. Stats. Ariz., par. 22): "Every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and however made or expressed, shall have the effect aforesaid and shall be construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as is provided by law in conveyances of real estate or other property." Paragraph 23 provides: "The debtor shall annex to such assignment a full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, . . . and the value of such estate according to the best knowledge of said debtor or debtors." Paragraph 31 provides: "No assignment shall be declared fraudulent or void for want of any inventory or list as provided herein." The deed of assignment in question conveyed in regular form "all his lands, tenements, chattels, property, and choses in action of every name and description not exempt from attachment and execution, wheresoever the same may be, as fully described and set forth in the schedule hereto annexed, and made a part of this assignment," being the form ordinarily used in cases of general assignment. There was, however, no schedule annexed to the deed, and it is on this ground, and this ground alone, that the appellants attack the validity of the deed. It would seem that the wording of the statute was so plain in its provision that "no assignment shall be void for want of any inventory or list" that it could not be misunderstood. If, however, any doubt remained, it should have been dissipated

by the ruling of the supreme court of the United States in the case of *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, cited by the appellants in their brief, wherein the court, in passing upon the construction of the Iowa statute, that is very similar to, and in fact almost identical with, the Arizona statute on this point, held: "In the event of a general assignment of property by one insolvent, or in contemplation of insolvency, for the benefit of creditors, the debtor is required to annex to the assignment an inventory of his estate, and the assignment is not invalidated or rendered void for the want of such inventory. Whatever estate belongs to the debtor at the time of a general assignment passes, by force of the statute, to the assignee." The court correctly construed our statute upon this point, and is fully sustained by the authority cited. No other question being presented, we find no error in the case, and the judgment of the district court is therefore affirmed.

Street, C. J., Sloan, J., and Davis, J., concur.

[Civil No. 543. Filed June 11, 1898.]

[53 Pac. 581.]

J. H. HAMPSON, Plaintiff and Appellant, v. FRANK DYSART, Treasurer and ex officio Tax Collector of Graham County, Defendant and Appellee.

1. TAXES AND TAXATION—ASSESSMENT—POWER OF BOARD OF EQUALIZATION TO CHANGE—REV. STATS. ARIZ. 1887, PAR. 2654, CONSTRUED.—Under the statute, *supra*, one of the powers of the board of equalization is to add to or deduct from the assessment-roll the valuation of property.
2. SAME—SAME—MUST PROCEED IN FORMAL MANNER—NOTICE—TIME AND PLACE OF HEARING—TIME MUST BE REASONABLE—WAIVED BY APPEARANCE.—In the changing of an assessment they must proceed in a formal way, giving notice to the persons interested, naming a day when they will act in the matter, and allowing a reasonable time to appear, but the question whether five days was reasonable or not is waived by the appearance of the party in interest.
3. SAME—SAME—RAISING—EVIDENCE—APPEAL AND ERROR—REVIEW—RECORD MUST SHOW THAT BOARD ACTED WITHOUT EVIDENCE—OTHER—

WISE ORDER CONCLUSIVE.—The record must affirmatively show that the board acted without evidence; otherwise, its order in the premises is conclusive that it did act on such evidence as was necessary.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Owen T. Rouse, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Appellant.

“Every essential proceeding in the course of a levy of taxes must appear in some written and permanent form in the records of the bodies authorized to act upon them. Such a thing as a parol levy of taxes is not legally possible under our laws.” *Moser v. White*, 29 Mich. 59; *Taymouth v. Koehler*, 35 Mich. 25; *Cooley on Taxation*, 339; *Cardigan v. Page*, 6 N. H. 182; *Farrar v. Fessenden*, 39 N. H. 268.

“Record is the only evidence, . . . and can be proved in no other way, unless proof of loss of the records.” *Paul v. Lenscott*, 56 N. H. 347; *Burlington R. R. Co. v. Lancaster County*, 4 Neb. 293.

There is no entry at the July meeting as to the assessment of plaintiff whatever—no order requiring the assessor to enter upon the assessment-roll any other property of plaintiff. The evidence of the clerk that the additions in red ink were placed there by the order of the board was incompetent.

The assessment was void because the action was taken without hearing any evidence. *People v. Reynolds*, 28 Cal. 113.

Wiley E. Jones, and William H. Lovell, for Appellee.

STREET, C. J.—The appellant, J. H. Hampson, being a non-resident of the territory of Arizona, but having property and possessions in Graham County, Arizona, consisting principally of live-stock and grazing lands, obtained a writ of injunction against the appellee, Frank Dysart, as treasurer and *ex officio* tax-collector of Graham County, restraining him from selling the personal property of appellant in Graham County in satisfaction of taxes in excess of that which was levied upon the basis of assessment made by the county assessor, after tendering to the tax-collector the sum of

\$1,970.74, being the amount of taxes appearing on the assessment-roll made by the county assessor. The board of supervisors of Graham County, sitting as a board of equalization in July and August, 1895, at a meeting held on the twenty-eighth day of August, made an order that the amount of assessment of property of appellant should be raised as follows, to wit:—

Raised on farming tools, \$40 to \$100.....	\$ 60
Raised on two wagons, \$30 to \$80.....	50
Added 8,000 head of stock cattle.....	54,000
Added 75 head cow ponies.....	2,250
Added 50 head stock mares.....	500
Added on land	1,175
Raised on improvements, \$450 to \$890.....	440
Raised on 6 W. mules, \$120 to \$240.....	120

The assessor had assessed appellant's stock cattle to the number of seven thousand head at the value of \$46,250; he had assessed the valuation on two wagons at thirty dollars, and had assessed the number of cow ponies at seventy-five; had assessed the value of improvements on the land at four hundred and fifty dollars. Before the raise in valuation was made or property had been added a notice was mailed to E. A. Cutter, the resident agent of J. H. Hampson, who appeared before the board of equalization and objected to the raise either in the amount of stock or the value of the property assessed by the assessor, which notice is as follows, to wit:—

“Office of Board of Equalization of the County of Graham. Solomonville, A. T., July 12th, 1895. J. H. Hampson: You are hereby notified that the board of equalization, upon due and sufficient information, have raised the assessed valuation of your property for the year 1895, in the following particulars, to wit:

On farm tools, \$40 to \$100.....	\$ 60
On 2 wagons, \$30 to \$80.....	50
On 7,000 to 8,000 head of stock cattle.....	54,000
On 75 to 150 C. ponies.....	2,250
Added 50 stock mares	500
On improvements, \$450 to \$890	440
On 6 W. mules, \$120 to \$240.....	120

"The said board will meet at their said office in the said county of Graham on the 17th day of July, A. D. 1895, at 10 o'clock A. M., when you can appear and show cause, if any you have, why your assessment on said property should not be raised.

"By order of the Board. MANUAL LEON, Clerk of the Board of Equalization. L. H. SMITH.

"(Please bring this notice. *Devuelva esta noticia con signo.*)"

Paragraph 2654 of the Revised Statutes of Arizona provides: "The board of equalization shall have power to determine whether the assessed value of any property is too small or too great, and may change and correct any valuation, either by adding thereto or deducting therefrom, if the sum fixed in the assessment-roll be too small or too great; whether said sum was fixed by the owner or the assessor; and if the board of equalization shall find it necessary to add to the assessed valuation of any property on the assessment-roll, they shall direct their clerk to give notice to the persons interested, by letter deposited in the post-office or express, or otherwise, naming the day when they shall act in that case, and allowing a reasonable time to appear. And the said board of equalization, on the hearing, are hereby empowered to issue compulsory process and require the attendance of any person or persons whom they may suspect to have a knowledge of the value or amount of such taxable property and examine such person or persons under oath in relation thereto. . . . During the session of the board of equalization the assessor shall be present, and also any deputy whose testimony may be required by the parties appealing to the board, and they shall have the right to make any statement touching such assessment, and produce evidence relating to questions before the board, and the board of equalization shall make use of all the information that they can gain otherwise, in equalizing the assessment-roll of the county, and may require the assessor to enter upon such assessment-roll any other property which has not been assessed; and the assessment and equalization so made shall have the same force and effect as if made by the assessor before the delivery of the assessment-roll by him to the clerk of the board of equalization."

The evidence shows that E. A. Cutter, as agent of appellant,

appeared before the board in pursuance to the notice and demanded of the board that the valuation of the property as assessed by the assessor be not raised, and protested against any property being added by the board to the assessment-roll. No evidence of any kind was taken before the board, nor was E. A. Cutter sworn and examined as to the property of appellant under his charge. The order was made final, except the amount of stock cattle was raised seven thousand head instead of eight thousand. The questions then arise,—first, as to whether the board of equalization had the right to change the valuation of the property as made by the assessor; and second, as to whether they had the right to add, at their own motion, property to the assessment-roll.

Under the reading of paragraph 2654, above cited, it is plain that one of the powers of the board is to add to or deduct from the assessment-roll the valuation of property. In doing so, however, they must proceed in a formal way and give notice to the persons interested, naming a day when they will act in the matter, and allow a reasonable time to appear. Whether the time as allowed in this instance was reasonable or not is not a subject of investigation in this case, for the agent of appellant who had the property in charge did appear. Such power of the board under similar statutes has been upheld by numerous decisions. *Challiss v. Rigg*, 49 Kan. 119, 30 Pac. 190; *Fields v. Russell*, 38 Kan. 720, 17 Pac. 476; *Pomeroy Coal Co. v. Emlen*, 44 Kan. 117, 24 Pac. 340.

It is further urged by appellant that the board of equalization added the seven thousand head of stock cattle, seventy-five cow ponies, and fifty stock mares without having taken any evidence on the question of the number of stock owned by appellant; and that they added the same of their own volition, and as of their own act, without pursuing the statutory method of requiring the assessor to add the same to the assessment-roll. The record in the case does not bear out the assertion of appellant in that particular. There is contained in the transcript a copy of the assessment-roll, in which appears the added property in red figures; and because the record fails to show the method by which the red figures were added, and how the additional number of head of stock was added, the appellant insists that it must be inferred that the board of equalization did that of their own volition, with-

out evidence, and as of their own act. The same matter is decided in the case of *Hagenmeyer v. Board*, 82 Cal. 214, 23 Pac. 14, 16, in which the court says: "The further point is made in favor of the judgment of the court below that the record does not show that the board took any evidence by which to be guided in raising the assessment, and that under section 3676 of the Political Code it could not, without evidence, raise an assessment. The record does not show by affirmative proof that the board did not act upon evidence before it. Therefore its order in the premises is conclusive that it did act upon such evidence as was necessary. *Humboldt County v. Dinsmore*, 75 Cal. 604, 607, 608, 17 Pac. 710. The judgment of the district court is affirmed.

Sloan, J., Davis, J., and Doan, J., concur.

[Civil No. 588. Filed June 11, 1898.]

[53 Pac. 590.]

GEORGE W. HENRY, Plaintiff and Appellant, v. JOSEPH MAYER et al., Defendants and Appellees.

1. EQUITY—TRIAL—JURY—GRANTING OF REQUEST FOR—ISSUES OF FACT TO BE SUBMITTED—DISCRETIONARY.—In a cause of equitable jurisdiction it is wholly within the discretion of the court whether or not a request for a jury shall be granted, and if a jury be called, as to what issues of fact shall be submitted to it.
2. SAME—SAME—SAME—VERDICT—FINDINGS—DISREGARDING—NO NECESSITY FOR FORMALLY SETTING ASIDE.—In a suit involving equitable jurisdiction only the trial court is at liberty to disregard the verdict and findings of the jury and make its own findings and enter a decree in accordance with the latter, and this without formally setting aside the verdict and findings of the jury before entering the decree.
3. SAME—SAME—SAME—SAME—ADOPTION BY COURT—APPEAL AND ERROR—REVIEW—TO BE REGARDED AS FINDINGS OF COURT.—The adoption by the court in its decree in an equity case of the findings of the jury was discretionary with the court and must be regarded simply as the findings of the court, and not of the jury, in so far as they may be reviewed on appeal.
4. SAME—GROUND OF RELIEF—FOLLY—FRAUD—MISREPRESENTATION AND DECEIT.—Where it is evident that the party seeking relief has

gotten the worst of the bargain, if this be due to his own folly and shortsightedness, and not to any willful misconduct on the part of the defendant or his agents, equity can afford him no relief not within the strict letter of his contract. But if, on the contrary, he be the victim of misrepresentation, fraud, and deceit practiced by and directly traceable to defendant, or indirectly through any of defendant's agents, then equity can and should afford him relief at the expense of defendant.

5. **SAME—APPEAL AND ERROR—REVIEW—FINDINGS—ONLY HELD ERRONEOUS FOR FORCIBLE REASONS—DEPENDENT ON CREDIBILITY OF WITNESSES—ON DEDUCTION FROM UNDISPUTED FACTS.**—The findings of the trial court should be given great weight, and be deemed conclusive, on controverted questions of fact in equity as in actions at law, unless there be forcible reasons to warrant the inference that they are erroneous. Particularly so when the findings depend upon the credibility of witnesses, and not merely upon deductions from facts concerning which there is little dispute.
6. **SAME — SAME — SAME — FRAUD — EVIDENCE—MATTER OF DEDUCTION FROM ACTS—CAREFULLY REVIEWED—SUFFICIENCY TO SUSTAIN FINDINGS AND DECREE.**—Where the gravamen of the complaint is fraud, it being rarely open, visible, or susceptible of direct and positive proof, and most usually a matter of inference to be drawn from the actions and conduct of men who at the time are careful to cover up their purposes and intent to deceive, so as to avoid detection and enjoy in safety the fruit of their wrong-doing, this court will carefully review the evidence to see whether it supports the findings and decree.
7. **PRINCIPAL AND AGENT—EVIDENCE OF AGENCY—OPTION TO PURCHASE PROPERTY.**—Where an option to purchase is nothing more than an authorization of the holder to find a purchaser, and for such service he is to receive a commission on the amount of the purchase money, he will be held to be the mere agent of the owners in effecting a sale.
8. **MINES AND MINING—FRAUD—MINING REPORT—SUBSTITUTING ORES—EVIDENCE—INSUFFICIENT TO JUSTIFY REVERSAL OF FINDINGS.**—Evidence that the report of the expert employed by the purchaser of a mine, whose competency and honesty were not impeached, grossly exaggerated the value of its ore, and that there was abundant opportunity for substitution of ores, upon which the report was based, by the vendors and their agents, while sufficient to justify a suspicion that the expert had been deceived in their values, does not warrant a reversal of the finding of the trial court that there was no fraud or knowledge of fraud on the part of the vendors in inducing the vendee to enter into a contract for the purchase of the mine.
9. **SAME—SALES—VENDOR AND VENDEE—PRINCIPAL AND AGENT—COMMISSION—FRAUDULENT REPRESENTATIONS AS TO AMOUNT—RECOVERY.**—Where the vendor of a mine and his agent represent to the vendee that there is to be no commission paid other than five thousand

dollars to this agent, and it is admitted that at the time the agent was to receive, and did receive, twenty-five thousand dollars, the vendee is entitled in equity in an action against the vendor to a reduction in the purchase price to the extent of the fraudulent commission.

10. **SAME—EQUITY — MISREPRESENTATIONS — FORFEITURE INDUCED BY—RIGHT TO POSSESSION.**—A plaintiff who had advanced all the funds and was the owner of practically all of the stock of a corporation operating a mine under a contract of purchase was induced by the representations as to what could be done with the property, made by a man who subsequently proved to be the agent of the owner of the mine, to pay off a large indebtedness of the company, to advance funds, enter into a new agreement regarding payment for the mine, and to permit this agent to run the property. The agent operated it for several months, and until debts not reported to the owner had so accumulated as to render further concealment impossible. He then, without notifying the corporation or plaintiff, turned the property over to the owner, who took possession under a forfeiture clause in his contract of sale. The circumstances were such as to justify the belief that at the time of entering into the new arrangement and agreement for the payment for the mine it was impossible that it could be successfully carried out. Plaintiff having put himself in a worse position in regard to the purchase than before he acted on the representations of the owner's agent, the taking possession was unwarranted, and the decree, in so far as it recognized the owner's right to the possession, was erroneous.
11. **VENDOR AND VENDEE—SALES—CONTRACT OF—FORFEITURES OF LAND NOT OWNED BY VENDOR—NOT ENFORCED IN EQUITY—NOT FAVORED IN LAW.**—Real estate cannot be forfeited to another which the other has never owned, and to which he has not title, because of a failure to pay for property which the vendor did own, and to which he did have title. Forfeitures are not enforced in equity and are not favored in law.
12. **MINES AND MINING—CONTRACT OF SALE—FORFEITURE OF MILL PROVIDED TO BE BUILT ON OR ADJACENT TO THE MINE—WILL NOT BE ENFORCED WHEN BUILT OFF THE PROPERTY SOLD.**—Where a contract for the sale of a mine provided that the purchaser should build a mill on "or adjacent" to a mine, and in case of failure to comply with the express condition of the contract, the mine and all improvements placed on "or adjacent to" said mines, including said mill, should be forfeited to the vendors, equity will not enforce said forfeiture clause, in so far as it affects the mill and machinery constructed on property not the subject of sale between the parties.
13. **CORPORATIONS—ADVANCES—SUBROGATION.**—Where plaintiff advanced all the funds used by a corporation of which he is the chief stockholder, he is entitled to be subrogated to the rights of the corporation.

14. MINES AND MINING—CONTRACT OF SALE—POSSESSION—ACCOUNTING—OWNER WRONGFULLY TAKING POSSESSION MUST ACCOUNT FOR PROFITS TO ONE ENTITLED THERETO.—Where the owner of a mine wrongfully takes the possession thereof from one entitled thereto under a contract of purchase, he must account for all profits derived from the working of said mine while so wrongfully in possession.
15. EQUITY—CONTRACT OF SALE—FORFEITURE—EXTENSION OF TIME FOR PERFORMANCE OF CONDITIONS OF SALE.—Under the evidence, plaintiff will be given ninety days in which to pay the balance of the purchase price after he is placed in possession and an accounting is had, and, if he elects so to do, defendant shall convey the property to him; in case the balance is not so paid, then a master shall sell the property as provided by law for the sale of real property under execution, and shall out of the proceeds pay to the defendant the balance due upon the purchase price of said mine and the balance to the plaintiff.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge. Reversed.

The facts are stated in the opinion.

J. F. Wilson, W. H. Barnes, and F. A. Johnson, for Appellant.

Parties in chancery cases have no right to demand a trial by jury. It is a right which exists at common law, but does not extend to cases in equity. *Walker v. Sedgwick*, 5 Cal. 192; *Cahoon v. Levy*, 5 Cal. 294; *Pacific Ry. Co. v. Wade*, 91 Cal. 499, 25 Am. St. Rep. 201, 27 Pac. 768, 13 L. R. A. 754; *Cassidy v. Sullivan*, 64 Cal. 266, 28 Pac. 234; *Bodely v. Ferguson*, 30 Cal. 511; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454.

The agents represented that they were to receive a commission of five thousand dollars. In fact, they received twenty-five thousand dollars. This was fraudulent, and appellant should be allowed to recoup all above the five thousand dollars which was paid to agent as commission, and which therefore constituted no part of the purchase price.

Herndon & Norris, for Appellee.

SLOAN, J.—The appellant brought this suit in the court below to obtain equitable relief upon the ground of fraud and

deceit in the sale of certain mining claims situated in Yavapai County, on the part of certain of the appellees, and to be subrogated to the rights of the Henrietta Mining and Milling Company, one of the defendants in the action under the contract of sale of said mines. The record discloses that in April, 1893, the appellees Joseph Mayer, Joel B. Slack, and James H. Slack were the owners of the Silverton and the Yankee Girl mining claims, and the appellees A. L. Butler, John Kelley, Frank Bliss, and said Joel B. and James H. Slack were the owners of the American Flag, the Invincible, and the Germania mining claims, all situate in the Big Bug Mining District, said county of Yavapai; that on April 6, 1893, said Mayer and Joel B. and James H. Slack gave to one H. N. Palmer an option to purchase said Silverton and Yankee Girl mining claims, for sixty days, for the sum of fifty thousand dollars; that about the same time the appellees Butler, Kelley, Bliss, and said Slacks bonded the American Flag, Invincible, and Germania mining claims to said Palmer for the sum of ten thousand dollars until July 3, 1893. The option given by Mayer and the Slacks was extended by agreement until the twenty-sixth day of June, 1893. Early in June, 1893, one James Shirley obtained from Palmer a written option for the purchase of said mining claims for the sum of one hundred thousand dollars. Upon the procurement of said option, Shirley visited the city of Chicago, and there met one Spooner R. Howell and one Frank M. Bradshaw, who introduced him to appellant, George W. Henry. Shirley represented himself as the agent of the owners of said properties to sell the same, and that he was to receive no commission for making the sale of said mines; but in the event of his finding a purchaser or purchasers he would look to the latter for his compensation. As a result of Shirley's representations, Howell, Bradshaw, and Henry became interested in the purchase of said mines, and sent one F. W. Ihne, a mining expert, to Arizona with Shirley to make an examination and report as to their value. Ihne visited the mines, produced ore therefrom, had a mill-run made of fifteen tons of ore, and as a result of his investigations and tests made a report, in which he stated, among other things, that a large amount of development-work had been done, and that there was in sight in the mines 62,625 tons of ore, of an average value of

fifty dollars, and aggregating in value the sum of \$3,281,250. On the receipt of this report, Howell, for himself and his associates, Henry and Bradshaw, came to Prescott for the purpose of making the purchase of the mines. Howell was met in Prescott by Palmer and Mayer and negotiations were then begun between Howell, Mayer, and Palmer for the purchase of the mining claims by the former. Before these negotiations were ended Palmer's option had expired, and the subsequent dealings were had between Howell and Mayer. As a result of these negotiations, an agreement to purchase was entered into between Howell, acting for himself and his associates, and Mayer, by the terms of which agreement Howell agreed to purchase the mines for the sum of one hundred thousand dollars, of which sum twenty-five thousand dollars was to be cash, twelve thousand five hundred dollars to be paid in sixty days after the execution of the agreement, and twelve thousand five hundred dollars in four months from the date of the agreement, and the remaining fifty thousand dollars to be paid on or before March 1, 1894. Howell further agreed to erect a twenty-stamp mill for the purpose of milling the product of the said mines on or at a place adjacent to said mining claims to be by him selected, and to pay one half the gross proceeds derived from the working of said mines in the shape of ore, bullion, concentrates, or otherwise to said Mayer, which was to be credited upon the unpaid purchase money until the same should be fully paid. Howell was to have full possession of all the property sold, and the full right of mining and extracting ores therefrom during the life of the agreement. Mayer agreed to execute a good and sufficient deed to all of said property and place the same in escrow with the Bank of Arizona, in Prescott, to be by said bank delivered to said Howell, his heirs, agents, or assigns, when the full purchase price should be paid. One of the terms of said agreement reads as follows: "A failure or refusal of said second party [Howell], for ten days after notice in writing given to him or his agent, to comply with any one of the obligations on him herein imposed, shall work a forfeiture of all his rights under this contract; and all of the money which he shall have paid, and all of the improvements by him placed on or adjacent to said mines, including said mill and all of its connections, and all of said mines, said water-

rights, and other appurtenances thereunto belonging, shall belong to and become the absolute property of said first party (Mayer), and there shall be no recourse on him, said first party; and said Bank of Arizona shall deliver to first party said deed left in escrow and this agreement." The date of this agreement was July 1, 1893. Prior to its execution Mayer had secured from the two Slacks an agreement to purchase their interest in the property for the sum of twenty thousand dollars, and from A. L. Butler, John Kelley, and Frank Bliss an agreement to purchase their interests for the sum of ten thousand dollars.

Howell, in accordance with his agreement, on the date of the execution thereof, paid to Mayer the sum of twenty-five thousand dollars. Howell and his associates, Mayer, Bradshaw, and Shirley, and one L. J. Webber, organized the Henrietta Mining and Milling Company, whereupon Howell assigned all of his rights under said agreement to the company. Shirley was elected manager of the company, took possession of the mines, and began development-work and the construction of the mill. The latter was completed in December, 1893, and was operated by the company until January 4, 1894. During this time twenty-five thousand dollars, in addition to the cash payment, was paid, under the agreement to purchase, to Mayer, and about forty thousand dollars expended in the erection of the mill and in development work upon the mines. During the short time the mill was in operation prior to January 4th it was operated at a loss, and a debt of something like thirty-three thousand dollars was incurred. Early in January, 1894, Henry came to Prescott and arranged to pay the indebtedness on the property, bought out Howell's interest in the company for ten thousand dollars, and also the interest owned by Shirley and Webber, and entered into an agreement with Mayer, modifying the first agreement in the respect that the balance of the purchase money then unpaid, which was the sum of fifty thousand dollars, should be paid to Mayer from the product of the workings of said property, as follows: One half of the gross product of said mines after milling was to be paid to Mayer until he should have received the full sum of fifty thousand dollars, and the said mines were to be worked and operated until he was fully paid. Palmer was to receive the entire

product and yield of said mines and mill, place the same in the Bank of Arizona, in Prescott, pay over one half of the same to Mayer from time to time, and the other half to be placed to the credit of the Henrietta Mining and Milling Company after paying the necessary and legitimate debts incurred in the working and operating of said mines and mill. He was to continue to have the right to so receive and pay out the proceeds of said mines and mill until said sum of fifty thousand dollars was paid to said Mayer. Under this agreement, Palmer took possession and control of the mines, mill, and property as manager, and continued to control and manage the same until the fifth day of May, 1894. During this time, from three to four thousand tons of ore were milled, from which was realized the gross amount of \$18,179.95. One half of this amount was paid to Mayer by Palmer under the agreement, and the other half used in paying the expenses of the operation of the property. A debt of twenty-one thousand dollars was incurred by Palmer in his management of the property. No reports were made by Palmer to the company during his control of the same, although frequent demands were made upon him by Henry and the officers of the company for statements showing the outputs of the mines, the receipts from the sale and working of the ores, and the expenses of mining and milling. About the 8th or 9th of April Palmer wrote to Henry that the mine was running behind and was in debt to the amount of eighteen thousand dollars. Henry immediately came to Prescott, and found from an examination that the condition of things was as reported by Palmer. On the 4th of May Palmer shut down the mill and turned the possession of the property over to Mayer, who thereupon claimed the same, both mines and mill, as having been forfeited to him under the terms of his agreement. Mayer has remained in possession of the property ever since.

The grounds of relief charged in the complaint are: First. That the contract or agreement for the purchase of the mines, dated July 1, 1893, was procured by means of the false and misleading character of the report made by Ihne as to the condition and value of the mines; that at the time Ihne made his examination of the property he was the guest of Mayer and Palmer, who supplied him with liquors during his visit to and pretended examination of said mines to such an extent

that Ihne was thereby rendered incompetent to properly examine the mines and to guard against deception, and that, instead of personally superintending and directing the sampling of ores from the mines and the testing of the same, he was, by reason of the fraudulent misconduct of Mayer and Palmer, imposed upon, misled, and deceived as to the value of the ores in sight in the mines; that Palmer and Mayer so connived with the owners of the same that the ores sampled by Ihne did not fairly represent the average values of said ores, but, on the contrary, showed results from six to ten times more than the fair average value of the same; that the fraud and deception in the above respect so practiced upon the appellant and Howell by said Mayer and Palmer were intended by the latter to procure the sale of the mines at a grossly exaggerated value, and constituted the inducing cause which led to the execution of the agreement of July 1, 1893. Second. That Howell and appellant were deceived by the representations of Palmer and Mayer as to the real purchase price of the property, in this: that they falsely stated and represented to said purchasers that the only commission allowed to Palmer under his agreement with Mayer was one of five thousand dollars, when in truth and in fact Palmer was to receive a commission of twenty-five thousand dollars for negotiating and assisting in the sale of the mines; that the false representation as to the amount of commission Palmer was to receive was made for the purpose and intent on the part of Palmer and Mayer to deceive the purchasers as to the value of said mines and the lowest price for which they could be purchased; that these representations so made by Palmer and Mayer were believed by Howell and appellant and constituted one of the inducing causes which led to the contract of purchase. Third. That the contract of January 4, 1894, was procured by Palmer and Mayer by means of false and fraudulent representations, and for fraudulent purposes; that the representations were, that the values contained in the ores were sufficiently high to permit of the working of the mines, extraction of ores, and the milling of same, at a handsome profit, and that in this way might be realized the money needed to complete the purchase of the property within the time specified in said agreement; that at the time the said agreement was entered into both Palmer and Mayer well

knew the true value and productiveness of said mines, and that under said agreement no profit could be realized therefrom by said company, but they falsely represented the true value and condition of the mines with intent thereby to obtain possession and contract of said mill, machinery, mines, and other property, and to so manage the same as to make the same unprofitable, and to bring the same into debt, and thereby to claim a breach of said contract on the part of said company, and to enable them to claim as forfeited the money paid upon said contract of purchase, and claim as forfeited all the rights of said company in and under said contract. Fourth. That the appellant is entitled to be subrogated to the rights of the Henrietta Mining and Milling Company by reason of the fact that he contributed all the money expended in the purchase of the same, in the development-work done upon the mines, and in the construction of the mill and other machinery connected therewith, and that no one else has contributed any money under said contracts of purchase.

No answer was put in by any of the defendants in the action with the exception of defendant Mayer, who denied specifically all the acts charged in the complaint to be of fraudulent nature and character, and such acts as were charged which would entitle the appellant to the relief he sought. Upon the trial of the case the court submitted certain issues in the form of interrogatories to the jury against the objection of the appellant. These issues, as submitted, were all found by the jury against the appellant, and in favor of the appellees, with the exception that the jury found that all the money which had been paid in purchase of the mines, the erection of the mill, and in the working and operation of both had been paid by appellant. Following the verdict of the jury, the court found that appellant was not entitled to a rescission of the contract of purchase of the mines, as prayed for in his complaint; that the purchase price for the mining property mentioned was one hundred thousand dollars; that all of the purchase price paid and the money spent upon the property was advanced by appellant, George W. Henry, and that therefore said Henry should be subrogated to the rights of the Henrietta Mining and Milling Company under said agreement; that of the purchase price the sum of \$60,475 had been paid, and the sum of \$39,525 remained un-

paid. The court decreed that appellant might complete the purchase of said mining property by paying appellee Joseph Mayer the said sum of \$39,525 on or before six months from the first day of April, 1896; and further, that appellant might enter into the possession of said property and work and operate the same during said period of six months, provided one half the gross proceeds thereof be paid to Mayer until he should have been paid the full sum of \$39,525, with interest thereon at the rate of seven per cent per annum from the time of taking possession. The decree further provided that in the event the appellant took possession of the property, he should continuously work and operate the said property until Mayer should be fully paid; provided further, as a condition precedent to appellant taking possession of said mines, he should execute and deliver to Mayer a good and sufficient bond in the sum of forty thousand dollars, to be approved by the court, conditioned that he would not run the said property into debt or make any debts or claims of any kind or character against said property, and that he would work the same in minerlike fashion, and in such a way as to preserve said mines as workable property, and to return the same clear of debts in a good and workable condition at the end of said six months in case the payment of the balance of the purchase price should not be paid. It was further provided in the decree that if at the end of the said six months Henry should be in possession of the property, and in good faith working and operating the said mines, and making payments thereon of one half the gross proceeds, and keeping said property out of debt, he should have an additional six months further time in which to complete the payment as above provided. In case Henry should pay the full sum of \$39,525 within six months from the first day of April, 1896, the decree provided that Mayer should make, execute, and deliver to appellant a good and sufficient deed conveying to appellant said mining properties—to wit, the American Flag, Invincible, Silverton, and Germania mining claims. From the decree so entered, appellant has brought this appeal.

The first question presented by appellant in his brief for our consideration relates to the submission to a jury of the issues of fact raised by the pleadings. Appellant contends that as the action is one for equitable relief wholly, and in-

volving equitable rights, requiring equitable relief, it was error to submit to a jury the determination of the issues of fact. It is true that, the cause being one of equitable jurisdiction, the court below was not bound to submit any issue of fact to a jury, but, on the contrary, might in its discretion have properly refused the request made by appellee Mayer for a jury trial. In other words, it was wholly in the discretion of the court as to whether or not a jury should be called, and if called, as to what issues of fact should be submitted to it. It is also well settled that in an action involving equitable jurisdiction only the trial court is at liberty to disregard the verdict and findings of the jury and make its own findings and enter a decree in accordance with the latter; nor is it necessary in such a case that the court formally set aside the verdict and findings of the jury before entering a decree in accord with its own findings. *Improvement Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177, and cases therein cited. No error, therefore, can be predicated upon the action of the court in this case in submitting to the jury certain issues of fact. The adoption by the court in its decree of the findings of the jury was discretionary with the court, and must be regarded simply as the findings of the court, and not of the jury, in so far as we are privileged to review the same upon this appeal.

With reference to the merits of the action, the issues of fraud raised by the pleadings are such as to necessitate a careful review of the testimony in the cause. The trial court found that Mayer was not guilty of any fraud or misconduct in the sale of the mines which affected his right as vendor to enforce in their entirety the terms of the sale as contained in the two contracts; and the decree was framed upon this finding, so as to secure to him all the fruits of his dealings with Henry and his associates. Under the decree, assuming that Mayer was entirely innocent of any misconduct in the sale, it is quite evident that he has profited by the failure of the purchasers to complete the contract. The court found that the purchase price for the whole property was one hundred thousand dollars; that Mayer had been paid in all the sum of \$60,475; and that there was left a balance of said purchase price of \$39,525. It is admitted, too, that at the time when the negotiations began for the purchase of the prop-

erty Mayer owned but a one-half interest in two of the claims sold—to wit, the Silverton and the Yankee Girl mining claims. It was shown that he bonded from the other owners in the property sold their interests for the sum of thirty thousand dollars, and subsequently paid them this amount out of the proceeds of the various payments made by appellant, which left for him the sum of \$30,475 for his individual interest in the two claims. Under the decree, therefore, he is allowed to retain the amount of money received from the purchasers, and to retain as his own all of the property which he contracted to sell for the sum of one hundred thousand dollars, together with the added improvements put thereon, and the mill and the machinery purchased by appellant and placed upon the property not originally owned by Mayer, and which cost the sum of forty thousand dollars.

Before one should in good conscience be permitted to reap where he has not sown, to profit by the misfortune, mistake, or undoing of another, or to enjoy the fruits of dishonesty and sharp practice, it should appear perfectly plain that he himself be free from any intentional wrong-doing and his skirts clean of any stain of fraud and deceit. It is evident that appellant has gotten the worst of the bargain and fared badly in his adventure. If, however, this be due to his own folly and shortsightedness, and not to any willful misconduct on the part of appellee Mayer or his agents, equity can afford him no relief not within the strict letter of the contract under which he seeks to be subrogated to the rights of the Henrietta Mining and Milling Company. But if, on the contrary, he be the victim of misrepresentations, fraud, and deceit practiced by and directly traceable to Mayer, or indirectly through any of his agents, then equity can and should afford him relief at the expense of Mayer. The findings of the trial court should be given great weight and be deemed conclusive on controverted questions of fact in equity as in actions at law, unless there be forcible reasons to warrant the inference that they are erroneous. Particularly should this rule be regarded when the right determination of the facts may have depended upon the judgment of the trial court as to the credibility of the various witnesses, and not merely upon reason and deduction as applied to a mass of facts and circumstances about which there may be little or no dispute. The gravamen of

the complaint in this action is fraud. Unless this be shown, the appellant must fail to obtain relief which he could not have had in an action at law. Fraud is rarely open, visible, or susceptible of direct and positive proof. It is most usually a matter of inference, to be drawn from the actions and conduct of men who at the time are careful to cover up their purposes and intent to deceive so as to avoid detection and enjoy in safety the fruits of their wrong-doing. We are constrained, therefore, to review the facts in this case and determine for ourselves whether these support the findings and decree of the trial court.

First. Was the sale of the mines to Howell and his associates procured by means of fraud, participated in by Mayer, or acquiesced in by him with a knowledge of the facts? For the right solution of this question it is necessary that the true relations between Shirley, Palmer, and Mayer be ascertained and understood, as those relations existed prior to and during the negotiations which led to the contract of purchase. As we have before stated, the record discloses that Mayer, at the time of the contract of July 1, 1893, was but a part owner in the premises sold. Prior to that time he had given, together with his associates, an option to Palmer to purchase his interest. It is quite apparent that this option or bond was nothing more than an authorization to Palmer to find a purchaser, and for his services he was to receive a commission on the amount of the purchase money. Palmer was therefore the mere agent of Mayer and his associates in effecting the sale. It will also be remembered that Shirley obtained an option or bond from Palmer, and upon the strength of this began his negotiations with Howell, Henry, and their associate, which ultimately led to a sale of the property. The connection between Mayer, Palmer, and Shirley was close and intimate, and that between Mayer and Palmer continued to be of a confidential character after Palmer's option had expired, and during the subsequent negotiations between Mayer and Howell, and indeed so long as Palmer had anything to do with the property. It was admitted by both Palmer and Mayer that the former was to receive a commission of twenty-five per cent upon the purchase money derived from the sale; and it appeared, further, that he received this commission upon the amount received by Mayer in the purchase of the

mines. The acts and conduct of Palmer and his knowledge in the matter of the sale of the property became therefore the acts, conduct, and knowledge of Mayer as his principal. The same is true of Shirley so long as the latter was acting as the agent of Palmer and Mayer in effecting the sale, which continued, as the evidence shows, until about the 25th or 26th of June, 1893. That the report made by Ihne as to the value of the mines was grossly inaccurate and misleading is abundantly shown from the subsequent history of the property. Instead of the average value of the ores being sixty-five dollars per ton, as stated by Ihne, actual tests made by Shirley while acting as manager of the Henrietta Mining and Milling Company, and by Palmer under the contract of January 4, 1894, did not show that the ore would mill more than \$7.50 per ton upon the average. The character of this report must have been due to the incompetency of Ihne or to a mistake due to his carelessness and inattention, or the flattering results obtained by him must have been due to some deception practiced by others in salting the samples taken from the mines, or to the substitution of rich ore in place of the ores actually taken from the property, or by some other method of deception due to the connivance of others. Nothing appears in the evidence other than the exaggerated nature of the report, which impeaches Ihne's competency as an expert on mines; nor does it appear anywhere that he had any motive to make a report not justified by the facts. Ihne's accounts of his visits to the mines and examination of the same are, in substance, that early in June, 1893, he went with Palmer to the mines, and there met Shirley, Mayer, and the other owners of the property; that he personally made an examination of the various claims, and directed Slack, one of the owners, and who was at the time the acting superintendent of the property, where to break down the ores to be sampled, and was present while this was done, saw that the same were sacked and sent to the mill; that he also took samples for assaying; after the samples had been sacked and sent to the mill, the latter being distant from the mines about two miles, he went to the mill, and remained there during the time the ores were worked; that he had broken from the stopes, and taken to the mill, in the neighborhood of eleven tons; that after the same had been taken to the mill he decided to have

brought from a large pile of ore on the dump of a shaft on one of the properties two or three tons of lean ore, so that he might be sure that his mill test would not run too high, but Palmer, who was present, agreed to look for a team and see that the ore was delivered; that this was done, and the lean ore added to the ores which he had taken from the stopes. Ihne denied any misconduct on his own part, or any knowledge of any misconduct on the part of any of the owners of the property during the time he was making his examination and tests to determine the value of the property. Shirley testified upon this point that he was present at the mines during Ihne's examination, and that the ores were taken out by the Slacks under Ihne's directions and superintendency; that the ore was put on the dump, sacked, and taken to the mill, and dumped into a bin there; that Palmer was present during this time, but did not go into the mines, and made no suggestions as to points from which ore should be taken; that the plates at Jones's mill, where the ore was worked, were cleaned before the tests were made; that neither Palmer nor Mayer were at the mill during the run; that Ihne was there every day, with one exception, when Palmer took him over to Big Bug, to examine the water supply; that he (Shirley) remained at the mill, and saw that no ore went in but the ore hauled from the mines; that the millmen made the clean-up, but that he did not know the result of the test until subsequently informed by Howell and Henry. Palmer stated in his examination that he had nothing to do with taking samples preparatory to making the mill run, and also had nothing to do with the mill test; that Ihne was absent during the run one day when he rode with him to Big Bug to measure the water supply. He denied furnishing Ihne liquors or intoxicants while at the mine, and that the only connection he had with the matter of obtaining ore from the mines and securing the mill run was in getting a team for Ihne to go after the additional ore desired by the latter. One Ben Rybon testified that while the ore was being taken to the mill from the mines he had examined the same, and had made objection to the quality of the ore to Shirley, and that the latter had said that he had better go and see Slack at the mine and see about it; that he saw Slack and told him to send better ore to the mill, and that Slack had replied that he would attend to it; that

Shirley was at the mill during the running of the ore, and claimed to be superintending the same; that his interest in the matter grew out of the fact that he was to get a commission upon the sale of Slack's interest. J. R. Slack testified that he had taken the ore samples from the ledge under the direction of Ihne; that he took from ten to twelve tons from the Silverton and Yankee Girl claims; that he sacked the same and sent them to Jones's mill by his own teams; that a number of men assisted him in getting out the ore; he thought he took the average samples; he denied having seen Rybon at the mine when he was taking the samples; that the last two tons which were sent to the mill were taken from different places over the dump under his direction; and that at the time Ihne was not at the mine, but was at the mill. Mayer's testimony upon this point was to the effect that he had nothing to do with the mill tests or assays or with furnishing the ore; that he did not go to the mine while Ihne was there, and knew nothing about the mill test. The appellant, Henry, testified that in April, 1894, Palmer, in a trip from Big Bug to Prescott, admitted to him that Ihne's report was a fabrication and a lie; that Ihne had told him to send over to the mill some ore from each of the claims; and that he was not going to miss the sale, and was very particular to see that he got good ore. This conversation was wholly denied by Palmer.

The foregoing constitutes, in effect, the evidence bearing upon the fraudulent nature of Ihne's report, and to what extent Mayer or any of his agents were concerned in the fraud, if any there was. There is enough to justify a suspicion, at any rate, that Ihne was deceived in some way in the value of the ores in the mines. It is also apparent that there was abundant opportunity on the part of either Shirley, Palmer, or Slack to have substituted rich ores in place of those actually taken from the stopes. We cannot say, however, from this evidence, that such a case is made out as would warrant us in holding contrary to the findings of the trial court upon this point, and in saying that Mayer or his agent, Palmer, participated in the fraud, if any there was, or had a knowledge that the same was perpetrated. The record is silent upon the question as to whether Mayer or Palmer knew of the results of the mill test, or had any knowledge as to the character of Ihne's report to Howell and his associates.

Upon the second ground of complaint—namely, that Howell and his associates were deceived by Palmer and Mayer as to the amount of commission which the former was to receive from the latter, and thereby deceived as to the true amount of purchase money—there can be little or no doubt. Howell, Henry and Bradshaw testified that Palmer on numerous occasions prior to the contract and subsequent to the contract stated that he was to receive a commission of five thousand dollars in all. They likewise stated that Shirley so represented the matter of Palmer's commission at the time he was negotiating for the sale of the properties in Chicago under his option from Palmer. Howell testified that during the negotiations for the purchase of the mines conducted by himself, which led to the contract of July 1, 1893, both Mayer and Palmer had stated to him that there was to be no other commission except the sum of five thousand dollars to Palmer. It was also admitted by both Palmer and Mayer that the actual commission to be received by Palmer was twenty-five thousand dollars. Mayer testified that Palmer received twenty-five per cent of the moneys paid to him under the contract of purchase. Does this statement amount to such a fraudulent representation as to the true purchase price as would entitle the appellant to a relief against the enforcement of the full purchase price by Mayer under the terms of the contract of sale? It was held in the case of *Van Epps v. Harrison*, 5 Hill, 63, "that a fraudulent representation made by the vendor as to price he paid for the land entitled the vendee to recoup for the damages occasioned by the fraud in an action on the bond given for the price." Howell also testified that Palmer represented that one hundred thousand dollars was the lowest price at which the property could be bought, notwithstanding the fact that Mayer, as it appears, was willing and anxious to obtain thirty thousand dollars for his interest in the property, and that the whole could have been bought at the time of the Howell contract for the sum of sixty thousand dollars. We think, in equity, the true purchase price of the property should be held not to be one hundred thousand dollars, as named in the contract, but this amount less the fraudulent commission agreed upon between Palmer and Mayer, and the amount due from appellant as the subrogee of the Henrietta Mining and Milling Company,

should be decreased by twenty thousand dollars, the amount of said fraudulent commission.

Third. The nominal parties to the contract of January 4, 1894, were Mayer, Howell, and the Henrietta Mining and Milling Company. The real contracting parties were Mayer and Henry. Howell after the organization of the company became its president and general manager. Henry, as found by the court, and as shown by the evidence, furnished all the money used by the company from his individual resources, and at the time of the execution of the contract owned practically all of the stock of the company. In December, 1893, Henry visited Prescott and found that the affairs of the company were in a bad way, with debts to the amount of thirty-three thousand dollars chargeable against it. Palmer urged him to pay off this indebtedness and get rid of Howell, as the latter was unpopular with the creditors of the company and unsatisfactory in his relations with the company, and promised, should Henry do this, to use his own language, to "pull off his coat and go to work, and pull Henry out of the hole." Palmer also represented that the property could be made to pay sufficiently to clear off the balance of the purchase money due to Mayer. In accordance with Palmer's advice, Henry bought out Howell as well as Shirley and Webber, and arranged to pay the thirty-three thousand dollars indebtedness. He then began negotiations with Mayer, through Palmer, to arrange for an extension of time for the payment of the unpaid purchase money, and, as a result of these negotiations and the representations made by Palmer, the contract of January 4th was entered into. Palmer then went into the possession of the property and began work. Under his management the property was operated at a loss from the start. Notwithstanding this, Palmer kept Henry in ignorance of the true condition of affairs, and, it is quite evident, purposely deceived him until the debts had accumulated to such an extent that further concealment was impossible. He further exhibited bad faith in turning the property over to Mayer without notifying the company or Henry of his intention to do so. Mayer during this time had full opportunity and full right under the agreement to know just what was being done by Palmer. The confidential relations existing between Palmer and Mayer render improbable the as-

sumption that Mayer could have been in ignorance of the results of Palmer's management, and his subsequent conduct in promptly taking possession of the property, and claiming the same under the forfeiture clause of the contract, is sufficient to justify the belief that he as well as Palmer was lacking in good faith in the premises; for they must have known at the time of the execution of the contract of January 4th that its performance was impossible; that the payment to Mayer of one half of the gross proceeds would not leave a margin sufficient to keep the property working; that debts would accumulate, and the company be embarrassed to such an extent that the interest of Henry and the company would be sacrificed. Both knew and understood that Henry was inexperienced in the mining business. They both knew, too, that Palmer's statements as a miner admittedly competent and experienced would have great weight with Henry, and that the latter would therefore be apt to confide in Palmer's statements of his ability to make the property pay under the agreement. We are persuaded that Henry was induced to enter into the agreement of January 4th, and to clear the property of the thirty-three-thousand-dollar debt, and thus put himself in a worse situation with reference to the purchase of the property than he otherwise would have been in, because of the representations of Palmer, and that at the time Palmer was Mayer's accredited agent. Under this view of the case we do not think that Mayer's taking possession in June, 1894, was rightful or warranted, and that in so far as the decree recognizes Mayer's right to the possession of the property it was erroneous.

Fourth. Again, we think the decree is erroneous in holding that Mayer was entitled to the possession under his contract of the mill and machinery which the evidence shows to have been constructed by the Henrietta Mining and Milling Company on property which was never owned by Mayer or his associates, but which had been located by the company after the contract of July 1, 1893. By no principle of law that we are aware of can real estate be forfeited to another which the other has never owned and to which he has no title because of a failure to pay for property which the vendor did own and to which he did have title. Forfeitures are not enforced in equity and are not favored in law. Notwithstand-

ing the clause in the contract of July 1, 1893, to the effect that upon failure of the vendee to comply with the terms of his purchase said failure should work a forfeiture of the rights of the vendee under the contract, and of the money which he should have paid, and all of the improvements by him placed on or adjacent to said mines, including said mill and all of its connections, and all of said mines, water-rights, and so forth, should belong to and become the absolute property of the vendor, equity will not enforce a condition so at variance with any principle of fairness and justice. The decree should provide that the mill and machinery constructed by the company on property not the subject of contract and sale between the parties on July 1, 1893, be the property of the appellant, as subrogee to the rights of the Henrietta Mining and Milling Company.

We conclude from a review of the facts and circumstances proven in the case that the findings of the trial court should be modified in these respects: 1. That the true purchase price of the property, instead of being one hundred thousand dollars, as found by the trial court, was the sum of eighty thousand dollars; and 2. That there was due at the time of the rendition of the decree the sum of \$19,525, instead of the sum of \$39,525, as was found by the trial court. We have reached the further conclusion that the trial court should have found that the taking possession of the property by Mayer was not warranted, but that the appellant, George W. Henry, as the subrogee of Spooner R. Howell, the Henrietta Mining and Milling Company, James Shirley, L. J. Webber, and Frank M. Bradshaw, was and is entitled to the immediate possession of the same, and that the appellee Mayer has acquired no right, title, or interest in and to the mill and other property not included within the contract of sale of July 1, 1893. We conclude, further, that a decree should be entered adjudging and decreeing that appellant, George W. Henry, be subrogated to all the rights of Spooner R. Howell, the Henrietta Mining and Milling Company, James Shirley, L. J. Webber, and Frank M. Bradshaw, under and by virtue of the contracts set forth in the complaint in the action for the purchase of the American Flag, Yankee Girl, Invincible, Silverton, and Germania mining claims, situated in the Big Bug Mining District, Yavapai County, Arizona; and that the

appellee Joseph Mayer be required to account for all moneys received by him from the sale of ores, bullion, concentrates, or other products derived by him from said mines from the time of his taking possession of the same until he surrenders the possession as hereinafter provided; and if it be found from said accounting that he has derived profit from the working and operation of said mines, the amount of said profit should be deducted from the amount due him under his contract of sale, dated July 1, 1893. The decree should further provide that the appellant, as the subrogee of Howell, the Henrietta Mining and Milling Company, Shirley, Webber, and Bradshaw, be put into immediate possession of all of said property, mill, and machinery; and that when it has been ascertained from said accounting how much, if any, of the balance of the \$19,525 remains unpaid of said purchase money, said appellant be given ninety days within which to pay the same; and in case he shall so elect, and shall pay said balance, the appellee Joseph Mayer be decreed to make, execute, and deliver to appellant a good and sufficient deed conveying to said appellant said mining properties,—to wit, the American Flag, Yankee Girl, Invincible, Silverton, and Germania mining claims,—being the same property described in the complaint in the action. It should further be decreed that in case said appellant do not pay said unpaid balance within the said ninety days, a master be appointed by the court to sell said mining claims in the manner provided by law for the sale of real property under execution, and that from the proceeds derived from said sale said unpaid balance of the purchase money shall first be paid to said Mayer, and the balance thereof be paid to appellant, George W. Henry; that said sale be subject to any and all liens which any creditor or creditors of said Henrietta Mining and Milling Company may have or obtain against said property; that said master be authorized to make a good and sufficient deed to the purchaser at said sale, upon the approval of the same by the trial court. The judgment and decree are reversed, and the court below is hereby instructed and directed to enter its decree in accordance herewith.

Street, C. J., Doan, J., and Davis, J., concur.

[Civil No. 621. Filed June 11, 1898.]

[53 Pac. 583.]

**A. L. JOHNS et al., Defendants and Plaintiffs in Error, v.
JAMES WILSON, Plaintiff and Defendant in Error.**

1. **MORTGAGES—FORECLOSURE — CODE PRACTICE — PARTIES DEFENDANT—GRANTEES ASSUMING DEBT — DEFICIENCY JUDGMENT.**— Under the code practice, where no distinction exists between actions at law and suits in equity, a mortgagee may, in a foreclosure suit, join as a party defendant a grantee of his mortgagor who has assumed the payment of the debt, and recover a deficiency judgment as against him.
2. **SAME—SAME—SUPPLEMENTAL FORECLOSURE—FRAUDULENT CONCEALMENT OF INTEREST OF DEFENDANT.**—The right to a supplemental foreclosure as to the interest of a party whose title was fraudulently concealed by defendants from plaintiff until after the former suit was commenced is undoubted.
3. **SAME—SAME—SAME—SAME—MISTAKE OF LAW—TO PRECLUDE RELIEF FACTS MUST BE KNOWN—FRAUD.**—The doctrine that where the plaintiff has made a mistake of law the court has no jurisdiction to grant relief has reference to cases where the facts are known and no fraud or deceit has been practiced. Where the defendants fraudulently induced a mortgagee to omit a necessary party defendant by fraudulently concealing his interest in the property until after the foreclosure suit was commenced, he is entitled to relief by a supplemental foreclosure.
4. **SAME—SAME—VOID DEED CONTAINING ASSUMPTION OF DEBT—PERSONAL JUDGMENT FOR DEFICIENCY AS AGAINST GRANTEE—ERROR.**—Where a deed conveying mortgaged property and containing a covenant by the grantee to assume and pay the mortgaged indebtedness is adjudged fraudulent and void, it is error to enter a personal judgment against such grantee for the deficiency.

AFFIRMED. 180 U. S. 440, 45 L. Ed. 613, 21 Sup. Ct. 445.

ERROR to the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. **Reversed.**

The facts are stated in the opinion.

A. J. Daggs, for Plaintiffs in Error.

The supreme court of the United States has held that a mortgagee could not maintain an action against a grantee of his mortgagor who assumes and agrees to pay by deed, be-

cause there was no "privity of contract"; and before he can proceed against such grantee of his mortgagor it must be alleged and proved that his remedy against his mortgagor has been exhausted. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75.

In the case of *Union Mutual Life Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118, the question was again before the supreme court whether a mortgagee could sue a grantee of his mortgagor, and Justice Gray said: "By the settled law of this court, the grantee is not directly liable to the mortgagee either at law or in equity, and the only remedy of the mortgagee against the grantee is by a bill in equity in the right of the mortgagor, and by virtue of the right in equity of a creditor to avail himself of any property which his debtor holds from a third person for the payment of the debt."

A grantee who assumes the debt of his mortgagor does not become the principal debtor, except by agreement with the mortgagee, as was held in *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456. "Privity of contract" must be shown. Story on Equity Pleading, 262-324; Bliss on Code Pleading, sec. 234; *Biddell v. Brizzolar*, 64 Cal. 354, 30 Pac. 609; *Waring v. Ward*, 7 Ves. Jr. 332; *Oxford v. Rodney*, 14 Ves. Jr. 417; *Woods v. Huntington*, 3 Ves. Jr. 128.

Having made a mistake as to the effect of his decree, which is a mistake of law, a court of equity has no power to grant relief. *Goodnow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Boggs v. Hargrave*, 16 Cal. 366; *Kenyon v. Welty*, 20 Cal. 641. And in the case of *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. Ed. 989, it is said, so far as the courts of the United States are concerned, the question may be deemed definitely at rest, "that a court of equity cannot grant relief against a mistake of law."

"It may be safely affirmed upon the highest authority as a well-established doctrine that a naked mistake of law unattended with any special circumstances (such as misplaced confidence, misrepresentation, or undue influence) will furnish no ground for the interposition of a court of equity; and the present disposition of courts of equity is to narrow rather than enlarge the operation of exceptions." Story's Equity,

sec. 138; *Snell v. Atlantic etc. Co.*, 98 U. S. 85, 25 L. Ed. 52; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. Ed. 989.

Thomas Armstrong, Jr., for Defendant in Error.

As to the right of plaintiff to maintain an action against the grantee of the mortgagor, he having assumed and agreed to pay the mortgage, the authorities cited by plaintiffs in error fully sustain plaintiff's right instead of denying it.

The plaintiff's former judgment against R. E. Daggs was merely a foreclosure of his interest in the mortgaged premises. In this action he is sought to be held as a guarantor of the payment of the debt as a purchaser who had assumed it.

"Proceedings in the nature of a suit to foreclose an equity of redemption held by a subsequent encumbrancer may undoubtedly be maintained by a purchaser under a decree where the encumbrancer was not made a party to the original suit to enforce the mortgage." *Goodenow v. Ewer*, 16 Cal. 468, 76 Am. Dec. 540. The case of *Boggs v. Hargrave*, 16 Cal. 559, 76 Am. Dec. 561, was one where a purchaser at a foreclosure sale sued to recover back the amount paid by him at the sale from the judgment creditor, and there was no prayer to set aside the sale, which is one of the essentials of this action.

"Parties will be relieved from a mistake of law as well as of fact." *Remington v. Higgs*, 54 Cal. 620.

While a mere naked mistake of law might alone furnish no ground for relief, yet there are exceptions, and many of them, where peculiar circumstances taken in connection with the mistake authorize the court to grant relief, and in the very case cited by plaintiff in error (*Snell v. Atlantic Ins. Co.*, 98 U. S. 85, 25 L. Ed. 52) such relief was granted. In that case the true rule is stated: "We trust the principle that cases may and do occur where courts of equity feel compelled to grant relief upon the mere ground of misapprehension of a clear rule of law is yet destined to afford the basis of many wise and just decrees without infringing on the rule that mistake of law is presumptively no sufficient ground for equitable interference."

DOAN, J.—On the twenty-fourth day of April, 1893, one John S. Armstrong executed a mortgage on certain real es-

tate to James Wilson, to secure the payment of two notes therein described, each for \$3,250 and interest. Afterwards, on the eighteenth day of December, 1893, the said Armstrong sold the premises thus mortgaged to one R. E. Daggs, and conveyed the same by a deed of conveyance, in which the said defendant R. E. Daggs agreed and bound himself, his heirs, executors, and assigns, to pay or cause to be paid to the said Wilson the aforesaid notes and mortgage, under which sale and transfer the said R. E. Daggs entered into the possession of the premises by one W. A. Daggs as his tenant. On the twenty-sixth day of April, 1894, default having been made in the payment of the notes thus secured by the mortgage referred to, the said Wilson commenced an action in the district court of Maricopa County against the said Armstrong and R. E. Daggs for the recovery of the amount due upon the notes and for the foreclosure of the mortgage upon the premises aforesaid, and on the same date filed a *lis pendens* in the office of the recorder of said county. At this time the defendant W. A. Daggs was in possession of the premises, supposedly as the tenant of R. E. Daggs, in whom, so far as disclosed by the record, the title then appeared to be. After personal service upon defendants R. E. Daggs and J. S. Armstrong, and default made and entered therein, said action proceeded to judgment in the said district court on the eighth day of May, 1894, against defendants J. S. Armstrong and R. E. Daggs for the full amount due, with costs, and for the foreclosure of the mortgage. Thereafter, on the sixth day of June, 1894, the property was sold by the sheriff of Maricopa County under execution and order of sale issued upon the said judgment, and was bid in by the plaintiff for the full amount of his judgment. Thereafter, and on the twelfth day of December, 1894, the sheriff of said county, there having been no redemption, executed a deed conveying or purporting to convey the premises aforesaid to the plaintiff by virtue of said foreclosure sale; and thereafter, upon a demand for possession of the premises by the purchaser under said sheriff's deed, the aforesaid W. A. Daggs was found in possession, and refused to surrender the same, and claimed to hold possession thereof as the tenant of one A. L. Johns, and has from that time to the present continued to hold and keep said premises and property as such tenant of A. L. Johns, to the total ex-

clusion of the plaintiff, Wilson. The record further discloses that on the twenty-eighth day of April, 1894, after the summons had been served upon the said R. E. Daggs and the *lis pendens* had been filed in the action aforesaid, a deed had been placed on record transferring the property in question from R. E. Daggs to one A. L. Johns, of Chicago, and on the demand for possession as aforesaid it was claimed by the defendant W. A. Daggs that on the first day of April, 1894, he ceased to be the tenant of R. E. Daggs, and thereupon became the tenant of the said A. L. Johns, and took possession of said property for said Johns at that time, and held possession from that time forward as the tenant of the said A. L. Johns, and not as the tenant of the said R. E. Daggs. Thereafter, on the twenty-second day of June, 1895, the plaintiff, James Wilson, filed his complaint in the said court in the nature of a bill in equity, setting up the facts aforesaid and alleging that at the time he commenced the action for the foreclosure of the mortgage the said J. S. Armstrong and R. E. Daggs were the only persons known to the plaintiff to be liable upon said notes or to have any interest whatever in said mortgaged property, and alleging that the said defendants R. E. Daggs and A. J. Daggs, conspiring together to hinder and obstruct the plaintiff in the collection of his said mortgage debt, did procure the said deed of conveyance of said property from the said R. E. Daggs to the said A. L. Johns for the sole purpose of hindering, delaying, and obstructing him in the collection of the said mortgage debt; that said pretended deed of conveyance, though dated on the seventeenth day of March, 1894, was withheld from the record until the twenty-eighth day of April, 1894, after the summons in said action upon the defendants Armstrong and R. E. Daggs had been served, after the said *lis pendens* had been filed for such purpose of delaying and defrauding the said plaintiff; that in said deed to A. L. Johns aforesaid said A. L. Johns expressly agreed and bound himself to pay this plaintiff's mortgage debt as aforesaid; that the plaintiff was not advised by the said W. A. Daggs of his surrender of the premises as the tenant of R. E. Daggs, or of the taking possession of the said premises by the said W. A. Daggs as the tenant of the said A. L. Johns, but that such abandonment and release of said property, or such asserting and taking pos-

session thereof, if done at all, was done secretly, without any notice whatever to the plaintiff herein, with intent to deceive this plaintiff into the belief that the said R. E. Daggs was the owner of the said premises, and possessed thereof by the said W. A. Daggs as his tenant; and that the plaintiff, on account of said secret transfer of possession, if any was made, was so deceived, as above alleged the defendant intended him to be, and that said action therefore proceeded to judgment without his joining or making the said A. L. Johns and W. A. Daggs defendants therein; that the plaintiff had no knowledge or information whatsoever when he commenced his said action and filed his said notice of *lis pendens* that any other person than the said R. E. Daggs and J. S. Armstrong had any claim whatsoever to said premises. Plaintiff further set up the refusal of the said W. A. Daggs to surrender the said property under the sheriff's deed aforesaid, and his claims made on said property as the tenant of said A. L. Johns, the exclusion of the plaintiff therefrom, and alleged damages thereby in the sum of one thousand dollars, and alleged that the real holding of said W. A. Daggs was in trust for the benefit of the said R. E. Daggs by and through the acts, bargains, and contrivances of the said R. E. Daggs and the said A. J. Daggs, who was the agent and attorney of the said A. L. Johns; that the property consists of farming lands, buildings, and improvements, and that defendants have neglected and refused to pay the taxes or keep up repairs on the said property, and have otherwise permitted waste thereon, and threatened so to do; that said property was inadequate security for debt of plaintiff against the same; that the defendants who resided in this territory, and were liable to pay such mortgage debt, were insolvent, and that all others who were liable to pay the same were beyond the jurisdiction of this court; that the plaintiff had no other security or means of collecting his said debt than through his lien upon said property, and was in danger, therefore, of losing the same, or the larger part thereof. Wherefore plaintiff prayed that he might have judgment against said R. E. Daggs and A. L. Johns, who, as aforesaid, have assumed and agreed to pay such mortgage debt, for the sum of sixty-five hundred dollars, with interest thereon from the date of said note, with attorney's fees and costs of suit, and for the sum of one thousand

dollars as damages by reason of the premises stated as aforesaid, and that the plaintiff's mortgage be adjudged to be wholly unpaid and unsatisfied, and that the same be foreclosed against said defendants and all of them, and all persons holding under them; and for such other and further relief as the circumstances of the case require and justice and equity demand. To this action the defendants answered separately, each by demurrer and answer, on different grounds. After such demurrers were overruled application was made for change of venue by two of the defendants, which application was denied, and the case was on December 21st tried before the court without a jury, and judgment was rendered in favor of the plaintiff for the amount of the debt and decree of foreclosure upon the premises granted. The deed dated 17th of March, 1894, from Daggs to Johns was decreed to be fraudulent and void, and a personal judgment was rendered against R. E. Daggs and A. L. Johns for the balance due on said judgment, to be made out of any other property of said R. E. Daggs and A. L. Johns as under ordinary execution. Defendants appealed, and thereafter sued out a writ of error and bring this case here for review.

The errors assigned are numerous, but as many of them are upon immaterial points and some are without merit it will only be necessary to consider those that go to the vital issues in the case. The first material proposition that is alleged is in support of the demurrers of the several defendants, on the ground that the grantees of the original mortgagor were not liable to a direct action by the mortgagee, because no privity of contract was shown in the pleadings to exist between said grantees and the mortgagee, and the action was not brought in the name of, or for the benefit of, the mortgagor. This is a mere matter of procedure, and is governed by the *lex fori*. In those jurisdictions where the common-law practice is yet observed one course is followed, while another rule obtains in those jurisdictions where the code practice has been adopted. The rule under the one procedure is very concisely stated by Mr. Justice Gray in the case of *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831, in the following language: "The only remedy of the mortgagee against the grantee was, as adjudged upon great consideration in *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, by bill in equity,

in which he might avail himself of the right of the mortgagor against his grantee, because in equity a grantor is entitled to avail himself of the security which his debtor holds from a third person for the payment of the debt. In the supreme court of the District of Columbia, as in the circuit courts of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law." Under our code practice, however, where our courts exercise a common jurisdiction, without any distinction between suits at law and in equity, the procedure adopted in this case is distinctly authorized. The rule is very plainly stated, and the reasons supporting it given, in *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411: "An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable therefor to the mortgagee; and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him, as well as against the mortgagor, for the amount of such deficiency. This liability results from the familiar doctrine in equity that the grantor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety."

The next assignment of error is based upon the proposition that the former judgment is conclusive against the parties to the action, and the plaintiff in this case has already had one judgment, and cannot bring a second action. This suit is brought for the purpose of foreclosing the mortgage against one who was not a party to the former suit, and whose non-joinder as a party in a former suit is explained in the pleadings herein, by the ignorance of the plaintiff of the said defendant's interest in the suit or title to the property; and that ignorance is further explained by the allegation in the pleading that upon the conspiracy and contrivance of the said defendant and other defendants who are joined with him all the interest of the said defendant in the suit, and the claim

of title to the premises, on the part of the said defendant, was purposely and fraudulently withheld from the knowledge of the plaintiff, and such fraudulent concealment of fact on the part of the defendants accounted for the non-joinder in the former suit of such defendant by the plaintiff herein. The right to a second or supplemental foreclosure of the interest of a party whose title to the premises is discovered after the former action without negligence or the want of due diligence on the part of the plaintiff in the former action, is fully sustained by our courts. *Morey v. City of Duluth*, 69 Minn. 5, 71 N. W. 694; *Brackett v. Banegas*, 116 Cal. 278, 58 Am. St. Rep. 164, 48 Pac. 90.

The next assignment of error is based upon the proposition that because the plaintiff has made a mistake of law the court has no jurisdiction to grant relief. The authorities quoted fully sustain the doctrine laid down by Justice Story that "a naked mistake of law, unattended with any special circumstances, such as misplaced confidence, misrepresentation, or undue influence, will furnish no ground for the interposition of a court of equity; and the present disposition of courts of equity is to narrow, rather than to enlarge, the operation of exceptions." This doctrine, however, refers to cases where a mistake of law has occurred where the facts are known and no fraud or deceit has been practiced; whereas, in this instance the relief is asked on the ground of mistake in fact as well as law, and for which mistake the fraud and deceit of the defendants are alleged in the pleadings to be responsible. In the case at bar, if any mistake of law was made, it was certainly induced by the fraudulent withholding from the record of the deed from Daggs to Johns until after the records were searched, the foreclosure suit begun, and the *lis pendens* had been filed.

The next and last assignment of error worthy of our attention is, that the court rendered a personal judgment against the defendant A. L. Johns for the full amount of the debt sued on, by reason of his liability under the terms of his deed from R. E. Daggs, after having adjudged and decreed the said deed to be fraudulent and void, and after having, for that reason, set the same aside. An examination of the record discloses the fact that in folios 264 and 265 the judgment declares: "It is hereby ordered, adjudged, and decreed that

that certain deed of conveyance of said premises executed by the defendant R. E. Daggs to the defendant A. L. Johns, dated the 17th of March, 1894, and recorded on the 28th day of April, 1894, is fraudulent and void as against this plaintiff and as against the aforesaid mortgage of this plaintiff." Presuming that the decree declaring the deed void is correct, and that the evidence fully sustains it, the correctness and validity of this decree in the judgment would render it error for the court to render a personal judgment against the said defendant A. L. Johns. If the deed mentioned had been considered valid, and Johns had been made a party defendant in the action, as prayed in the complaint, and his title thus extinguished under the foreclosure, the personal judgment against Johns for any deficiency that might remain would have been proper; but, if the decree adjudging the deed fraudulent and void is correct, then it would naturally follow that that deed could neither convey to Johns title to the property, nor could a stipulation in a void deed make Johns personally liable for a debt that was a debt against the property to which such void deed failed to convey title; and the validity of the decree as rendered in folios 264 and 265, setting aside the deed as fraudulent and void, renders erroneous the decree granting a personal judgment for the mortgage debt against Johns as the grantee in such void deed, as given in folio 261, and the reference to Johns in the direction to the sheriff, "that said sheriff make the balance due upon said judgment out of any other property of said defendants R. E. Daggs and A. L. Johns as on ordinary execution," as shown in folio 270. It is therefore ordered that the judgment be modified by omitting therefrom the personal judgment against A. L. Johns for the amount of the mortgage debt as shown in folio 261, and omitting therefrom the reference to A. L. Johns in the direction to the sheriff, "that said sheriff make the balance due upon said judgment out of any other property of the said defendants R. E. Daggs and A. L. Johns," as shown in folio 270 of the abstract of said judgment as filed herein. The case is therefore remanded, and the district court is directed to modify the said judgment as indicated herein.

Street, C. J., Sloan, J., and Davis, J., concur.

[Civil No. 595. Filed June 11, 1898.]

[53 Pac. 575.]

**CONSOLIDATED CANAL COMPANY, a Corporation,
Plaintiff and Appellant, v. MESA CANAL COMPANY,
a Corporation, Defendant and Appellee.**

- 1. IRRIGATION—CONTRACTS—INJUNCTION—RIGHT TO—DEPENDENT UPON AGREEMENT.**—Where plaintiff canal company has entered upon and enlarged the canal of defendant company under a written contract, such contract determines the right of plaintiff to enjoin defendant from doing any act in control of its property and conduct of its business.
- 2. SAME—SAME—SAME—USE OF IRRIGATION WATER FOR POWER PURPOSES—DESTRUCTION OF WATER-POWER.**—Where plaintiff canal company has entered upon the canal of defendant and enlarged and raised the grade of the same above the division-gates, under an agreement that before plaintiff "is entitled to receive or use any water through the canal, it shall first deliver at the division-gates seven thousand inches of water to defendant," and the agreement is silent as to the elevation at which water should be delivered, plaintiff is not entitled to an injunction restraining defendant from placing a dam, at its own expense, below the division-gates, sufficiently high to raise the water so as to irrigate lands under defendant's canal that could not have been formerly irrigated at the original elevation, though such dam destroyed a water-power developed by the drop at the division-gates and used for years by plaintiff, it appearing from the evidence that such water-power was so generated by the seven thousand inches the use of which is denied to plaintiff in its contract with defendant.
- 3. SAME—SAME—SAME—SAME — DIMINISHING CARRYING CAPACITY.**—A slight difference in the carrying capacity of plaintiff's canal is insufficient ground to warrant such injunction where it appears that the height of the water as raised by the dam does not exceed the level at which it had been carried by the plaintiff to the point of delivery.

AFFIRMED. *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U. S. 296, 20 Sup. Ct. 628, 44 L. Ed. 777.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, Thomas D. Bennett, and John D. Pope,
for Appellant.

C. M. Frazier, for Appellee.

DOAN, J.—This was an action brought by the appellant in the lower court to enjoin the appellee from building and maintaining a check or dam in appellee's canal, and thereby backing up the water against the division-gates that separated the waters of the appellee's canal from the waters in the canal of the appellant, and thereby impeding the flow of water in the appellant's canal, and destroying a water-power used by appellant for propelling machinery. Both parties to this action are corporations doing business in the county of Maricopa, Arizona Territory, organized for the purpose of conveying water from the Salt River, and delivering the same to the consumers and users thereof along the line of their proposed and constructed canals, and both are engaged in the transaction of such business. The appellee, being the owner of the Mesa Canal, on January 10, 1891, entered into a written contract with A. J. Chandler, authorizing him, his successors and assigns, to take possession of that portion of the Mesa Canal between a point known as "Ayer's Headgate" and a point on the Salt River where the said canal was taken out, and to reconstruct and enlarge the canal, thereby increasing its carrying capacity, and thereafter delegating to the said Chandler, his successors and assigns, the management and control of the part so to be enlarged and reconstructed. Chandler transferred his rights under the contract to the appellant, the Consolidated Canal Company, which last-named company enlarged and reconstructed the Mesa Canal down to the place called the "Division Gates," which latter point seems, by the evidence in the case, to have been by mutual consent of the contracting parties substituted for Ayer's headgate as the point of division of the waters and delivery by the appellant to the appellee of the water to which the latter is entitled. In thus enlarging and reconstructing the canal appellant raised the grade thereof at great expense, for the purpose of carrying the water at a higher elevation, thereby enabling the canal to cover more and other lands. The elevation of the grade at the point where the division-gates were located was about five feet above the grade at that point on

the canal formerly owned by the appellee. The purpose and desire of the appellant was to secure through the enlarged canal a flow of water for irrigation and other purposes for itself and patrons. Under the terms of the agreement for such purpose, it bore the expense of the enlargement and reconstruction of the canal to that point from the point of diversion on the river, and obligated itself to deliver at this point to the appellee, at a certain annual rental, seven thousand inches of water, which amount was in the stipulation agreed upon as the original carrying capacity of the Mesa Canal. Upon the construction of the division-gates at the point named, the appellant delivered the water to the appellee at the elevation of the former canal at that point, thereby securing a waterfall of five feet in the water thus delivered. After delivering the water in that manner for some years, the appellee built a dam in its canal a short distance below the division-gate, that raised the water and caused it to flow through a lateral ditch that enabled the appellee to irrigate some lands under its former canal, on which it had not been able to place water from its former elevation. The effect of this raise in the water was to reduce the fall at the division-gate. Thereafter the appellant constructed a water-wheel, and a mill for grinding grain, to be driven thereby, and erected them at the division-gate, the wheel to be turned by the water after its discharge through the division-gate for delivery to the appellee; whereupon the appellee increased the height of the dam that had been formerly built to such an extent that it raised the surface of the water, and backed up the same against the division-gate in such a manner as to destroy three and one half feet of the five-foot fall that had been thereby occasioned, and totally destroyed the water-power. A further result of the elevation of the water in the appellee's canal was to impede the flow of water in the appellant's canal above the division-gates, and thereby detract from the carrying capacity of the appellant's canal.

On the refusal of the appellee, when requested by the appellant to remove the dam, this action was brought; and upon the allegation that the damage to the appellant could not be estimated or approximated and was irreparable, and could not be adequately compensated in money value, the court was asked to enjoin and restrain the appellee from maintaining

the dam at the said place, or at any place, below the division-gates, that would back up the water against said division-gates and destroy or injure this water-power or impede the flow of the water in the appellant's canal. The Mesa Canal Company (appellee) demurred to the complaint, entered a general denial, and further alleged that if the grade of the Mesa Canal below the headgate was raised by the Consolidated Canal Company in the enlargement or reconstruction of the Mesa Canal, said grade was not raised for the exclusive right or benefit of the Consolidated Canal Company, but inured to the benefit of the Mesa Canal Company as well, and that the said Mesa Canal Company have the right to receive and enjoy whatever benefits may arise from the raising of said grade; that whatever machinery or appliances were placed by the Consolidated Canal Company at the division-gates or below was without any right or authority, and against the rights of the Mesa Canal Company, and was an intrusion into, and a trespass upon, the rights of the Mesa Canal Company in having its water flow through and below the division-gates unimpeded and unobstructed in any manner whatever. The answer further alleges the dam was constructed about seventy-five feet below the division-gates, for the purpose of forcing water into a lateral ditch, in order to irrigate lands which were properly irrigable through the Mesa Canal below the division-gates, and that the dam was built only so high as was necessary to properly run the water into the lateral ditch. After the introduction of evidence and argument of counsel the court took the case under advisement, and afterwards rendered judgment for the defendant, denying the injunction or any other relief; from which judgment of the court and the order denying a new trial an appeal was taken and the case brought to this court.

There have been some points urged in the argument that were not based upon any allegation contained in the complaint. There were some matters alleged in the complaint that were not included in the prayer for relief nor supported by the evidence introduced at the trial of the case, and are not therefore properly before this court. The right to enjoin the defendant company is predicated in the complaint upon the destruction of the water-power and the obstruction to the flow of water in the canal and the consequent diminution of

its carrying capacity. The prayer is for an injunction restraining the defendant company from backing up the water against the division-gates and destroying the water-power and impeding the flow of water in its said canal.

The rights to enjoin the defendant company from the act mentioned, or from any act in the control of its property and conduct of its business, are necessarily those, and those only, which are conferred in the agreement entered into between the parties. In that the appellant was entitled to receive and use the water conducted by the canal that might be constructed when such agreement was made, and that was in compliance with the terms thereof afterwards constructed, by the appellant on the site of the canal formerly owned by the appellee; but that agreement contained the express stipulation that, "before it is entitled to receive or use any water through said canal, it shall first deliver at the division-gates the seven thousand inches of water agreed upon as the capacity of the original Mesa Canal." The agreement is silent as to the elevation at which the water should be delivered, and the appellant claims the right to deliver the water at the elevation at which the Mesa Canal Company had formerly received and used it at this point, and therefore constructed the division-gates to deliver the water at such elevation. This does not seem to have been objected to by the appellee. The water was thus received, and the annual rental paid, for years. There is now no step taken to compel the appellant to deliver it at any other elevation; but, at its own expense, by a dam erected on its own property, the appellee is raising the water to the elevation that will enable it to use such water to cover lands that could not be irrigated at the former elevation. The destruction thereby of the water-power would entitle the appellant to relief, if the water-power destroyed was one within the appellant's canal, or if the destruction of the use of the water to turn the wheel was destruction of, or interference in, the use of water which appellant was entitled to receive and use; but the evidence in the case discloses the fact that the water attempted to be used to produce the water-power is the seven thousand inches which under the terms of the agreement the appellant is obligated to deliver to the appellee before the appellant is entitled to receive or use any water through the enlarged canal.

The question has been raised in the pleadings as to whether the place of use was within that part of the canal over which the appellant was authorized to exercise control and management, or within the part of the canal over which the appellee had never conceded any authority to the appellant, and was therefore under the control of the Mesa Canal Company. It is not material to the determination of this issue which company has jurisdiction over the place where the water-power is located. The stipulation in the agreement makes it obligatory upon the appellant to deliver this water to the Mesa Canal Company "before it is entitled to receive or use any water through the canal," and therein expressly denies to, and withholds from, the appellant any right to the use of this water, either to turn wheels or irrigate lands, or for any other purpose, until after it is delivered; and most assuredly the appellant could claim no right to it, or authority over it, or right to use it, after its delivery to the parties expressly entitled to it. The evidence does not show that the water had been raised by the check complained of above the level at which it had been carried by the appellant's canal to the point of delivery, nor above the level of the water remaining in the appellant's canal at that point. There being no stipulation fixing the elevation at which the Mesa water should be delivered, it would seem fair to suppose that it should be delivered at the elevation of the enlarged canal at the point of delivery. While the appellee might not be able to compel the delivery at such elevation without express agreement, it would be unjust and inequitable, without an express stipulation to that effect in the agreement, to compel the appellee to not only receive its water, but to continue to use it, at an elevation five feet lower than the rest of the water that had been carried that far in the same canal, simply to accelerate the flow of water, and thus increase the carrying capacity of the canal, in the interest of the other contracting party. The slight difference thus caused in the carrying capacity of the appellant's canal would seem to have been properly held by the lower court to be insufficient ground to justify interference in the proper and advantageous use of the water in its own canal by the appellee, since the elevation to which it was thus raised did not exceed the level at which it had been carried to the point of delivery by the appellant, or the level of

the water in the appellant's canal that had been carried to this point in the canal that was the common carrier for the water of both parties. An examination of the record discloses no error on the part of the lower court, and the judgment is therefore affirmed.

Sloan, J., and Davis, J., concur.

Street, C. J., took no part in the decision, having been of counsel.

[Civil No. 604. Filed June 11, 1898.]

[53 Pac. 495.]

ALBERT STEINFELD, Intervener and Appellant, v.
HENRY MENAGER, Plaintiff and Appellee; RICH-
ARD FARRELL, Defendant.

1. ATTACHMENT—LEVY—RANGE STOCK—LAWS 1889, ACT NO. 20, SEC. 9, SUBD. 3, CONSTRUED—NOTICE OF LEVY MUST BE RECORDED TO PERFECT LIEN.—A levy of a writ of attachment upon range stock, made under the statute, *supra*, creates no lien until a copy of the notice required to be served on the owner, attached to the writ, has been filed with the county recorder.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Reversed.

The facts are stated in the opinion.

S. M. Franklin, for Appellant.

C. W. Wright, for Appellee.

DOAN, J.—On the twentieth day of March, 1897, Henry Menager brought suit by attachment against Richard Farrell, in the district court of Pima County, to recover the sum of \$2,116.42, with interest. The sheriff made a levy of this writ of attachment in the following manner upon defendant's cattle of the O I L brand, which were running at large on the

range. On the day he received the writ he gave notice in his office in Tucson, in the presence of two witnesses, James N. Leevy and A. J. Preston, that he had levied on said cattle. Thereafter, on that date, March 20, 1897, he filed with the county recorder of Pima County a copy of the writ of attachment, together with a copy of his indorsement of levy; the copy of said indorsement of levy, attached to said writ of attachment, being in words and figures following, to wit: "Office of the Sheriff, County of Pima—ss.: Under and by virtue of the within writ of attachment, I have, on this 20th day of March, 1897, levied upon all of the horned cattle of the within-named defendant, Richard Farrell, which are branded thus, O I L, and have also levied upon said brand, said brand being of record in the office of the county recorder of said Pima County, Arizona Territory, in Book 1 of Marks and Brands, on page 216 thereof; said horned cattle being estimated by me to be about 200 head in number. All of said horned cattle are running at large on a range in said Pima County, Arizona Territory, to wit, in and around Harshaw, in the southern part of said county, and cannot be herded or penned without great inconvenience and expense. Said levy was made in the presence of James Leevy and A. J. Preston, two credible persons. Done this 20th day of March, 1897, at Tucson. R. N. LEATHERWOOD, Sheriff, by W. H. TAYLOR, Deputy Sheriff. Witnesses: J. N. LEEVY, A. J. PRESTON." On the twenty-fourth day of March, 1897, and prior to the service on him of the notice of the levy of attachment by the sheriff, the defendant Farrell executed to Albert Steinfeld a promissory note for the sum of \$4,128.02, due in one day from date, also a promissory note to Wheeler & Perry for the sum of \$3,003.69, due one day from date, being for indebtedness due the respective payees from him on that date, and executed to Albert Steinfeld a chattel mortgage on all the cattle of said O I L brand, and on other personal property, as security for the payment of said promissory notes, which chattel mortgage, with the affidavit of the parties thereto that the same was made in good faith and without intent to defraud creditors and purchasers, was recorded in the office of the county recorder of Pima County on the said twenty-fourth day of March, 1897. Thereafter, on the said twenty-fourth day of March, 1897, the sheriff served on the defendant Farrell a

notice of the levy of said attachment, which notice was in words and figures following, to wit: "Office of the Sheriff, County of Pima—ss.: To Richard Farrell, his herder, agent, or man in charge, or to whom it may concern: This is to certify that I did, on the 20th day of March, 1897, levy upon all of the horned cattle of the said Richard Farrell which are branded thus O I L, by filing a copy of the levy, together with a copy of the writ of attachment, in the office of the recorder of said Pima County, Arizona Territory, in a case wherein Henry Menager is plaintiff and Richard Farrell is defendant. R. N. LEATHERWOOD, Sheriff, by W. H. TAYLOR, Deputy Sheriff." Steinfeld, as the owner of said chattel mortgage, thereafter filed his complaint in intervention in the attachment suit, wherein he asked the court to adjudge that the attempted levy of said writ of attachment on said cattle was void; that no lien was perfected thereby, because the requirements of the law relative to such levy were not complied with; and asked that the court decree the lien of attachment void as against the chattel mortgage, and that the lien of the chattel mortgage be declared by the court prior to any lien under said attachment. The case was tried to the court, without a jury, and judgment was rendered in favor of the attaching creditor, Menager, for the amount claimed and interest. And the court found, among other things, that the levy of the attachment was valid and created a lien; that this lien was prior to the lien of the chattel mortgage of intervener, Steinfeld, which was executed and filed on March 24, 1897. From this judgment of the court, and the order denying a new trial, the intervener appealed, and has brought the case to this court.

He assigned as error, first, that "the court erred in holding that the attempted levy of the writ of attachment on the cattle of the O I L brand was a good and valid levy"; that "the court erred in holding that the lien established by the levy under said writ was prior to the lien under the chattel mortgage of intervener, and valid as against such chattel mortgage." The levy of the attachment was made under the provisions of subdivision 3 of section 9 of act No. 20 of the Session Laws of the fifteenth legislative assembly of Arizona. The method of levying on cattle running at large on the range is therein prescribed as follows: "A levy upon horses, mules, jacks, jennets, horned cattle or hogs, running at large in a

range, and which cannot be herded or penned without great inconvenience and expense, may be made by designating, by reasonable estimate, the number of animals, and describing them by their marks and brands, or either. Such levy shall be made in the presence of two or more credible persons, and notice thereof shall be given in writing, to the owner or his herder, or agent if residing within the county, and known to the officer making the levy, and a copy of such notice, attached to a copy of the writ, shall be filed by the officer with the county recorder of the county wherein the levy is made." In the case at bar the sheriff made his levy in his office in the presence of two witnesses, as required by the statute. He then indorsed the return of his levy on the back of the writ. He then filed the writ of attachment and his return thereon with the county recorder; but did not serve at that time any notice of such levy upon the owner or his herder or agent, nor file any copy of such notice with the recorder, as required by the statute. On the 24th of March, the owner and attachment debtor executed a chattel mortgage covering this property to the intervener, Steinfeld, who at once placed the same of record, and thereby established and perfected his lien under the mortgage upon the property. After the execution and record of the mortgage, and on the same day, the sheriff served upon the owner, Farrell, the notice of the levy of the attachment in pursuance of the requirements of the statute, but did not file a copy of the said notice with the county recorder, as was further required, and had not up to the time of trial filed such copy of notice with the recorder. The claim is made on the part of the appellant that the possession by the sheriff being constructive under this system of levy, and this mode of levy entirely statutory, in order to perfect the lien under the levy the requirements of the statute must be strictly complied with, and that the filing with the recorder of the writ of attachment and the return of the levy made thereon is incompetent to create a lien without the copy of the notice served upon the owner being recorded therewith.

The law plainly states that in making this kind of levy a copy of the notice, that has been served on the owner, herder, or agent, of such levy, attached to the writ, must be filed with the recorder, and no lien is created upon the property until that requirement is complied with. The case appears to have

been presented to the lower court, and has been presented in this court, upon the theory that a notice of the levy had been filed with the recorder, and that the irregularity consisted in its not having been a *verbatim* copy of the notice served upon the owner. The record, however, discloses the fact that there was no copy of notice of the levy filed with the recorder. The only record that was made was of the writ of attachment and a copy of the levy; and in the notice served upon Farrell the sheriff states that he made said levy by filing a copy of the levy, together with a copy of the writ, in the office of the county recorder. No claim is made that any notice or copy of notice was filed. The provision of the law for this kind of levy is that the levy shall be made in that manner, and a notice thereof given in writing to the owner; and a copy of such notice, attached to the copy of the writ, shall be filed by the officer with the county recorder. The failure of the officer to do these things as required by law was fatal to the validity of the levy by attachment. *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91; *Sharp v. Baird*, 43 Cal. 577. The copy of the levy being filed with the recorder, as stated in the return of the officer, does not meet the requirements of the statute, and is insufficient to create a statutory lien by attachment upon the property. The district court erred in holding that any lien was created that was prior to the lien under the mortgage executed and recorded on March 24th. The judgment is therefore reversed, and the case remanded.

Street, C. J., and Sloan, J., concur.

[Civil No. 568. Filed June 11, 1898.]

[53 Pac. 586.]

P. L. KASTNER et al., Defendants and Appellants, v. JOHN G. CAMPBELL, Plaintiff and Appellee.

1. LANDLORD AND TENANT—LEASE—ACTION FOR RENT—EVIDENCE—RESCISSION OF LEASE AT DATE LATER THAN TIME FOR WHICH RENT IS SOUGHT—IMMATERIAL.—Evidence tending to show a rescission of a lease at a date later than the month for which recovery of rent is sought is immaterial.

2. **SAME—SAME—SAME—SAME—LESSEE'S ACTS TOWARD SURRENDER OF ESTATE PROPERLY EXCLUDED IN ABSENCE OF AVOVAL OF INTENTION TO PROVE LANDLORD'S ACQUIESCENCE THEREIN.**—An offer of proof of the service of notice by the lessee of his intention to leave the leased premises, and also of other acts, solely upon his part, showing what he alone did towards surrendering the lease, is properly refused, upon objection, there being no avowal that these acts would be connected with any acceptance on the part of the lessor.
3. **SAME—SAME—SURRENDER — AGREEMENT — ACTS EVIDENCING AGREEMENT.**—The surrender of a lease is the yielding up of the estate to the landlord so that the leasehold interest becomes extinct by mutual agreement between the parties. It is either in express words or by operation of law, through some act which implies that they have both agreed to consider the surrender as made.
4. **SAME—SAME—SAME—EVIDENCE—ADMISSIBILITY.**—In an action for rent due upon a lease where the defense is surrender of the lease, evidence of a dissolution of partnership between the lessees and the removal of one with the knowledge of the lessor prior to the default in the rent and of a controversy between the lessor and the remaining partner about the rent, and of said partner's desire to pay the rent and remove to a building he had been forced to construct, and of the lessor's refusal to permit such removal, is inadmissible to prove surrender of the lease.
5. **SAME—SAME—SAME — JURY — INSTRUCTIONS — ONLY SUCH AS ARE PERTINENT TO THE EVIDENCE.**—It is the duty of the court in charging the jury to give only such instructions as are pertinent to the evidence.
6. **SAME—TENANCY AT WILL—WHAT CONSTITUTES — TERMINATION.**—If the lessee is occupying premises under a verbal agreement with the owner that he should pay therefor one hundred dollars per month, which agreement is to continue for no definite length of time, such lessee is a tenant at will, and can terminate the lease whenever he chooses by giving to the owner reasonable notice of such intention and paying all rent due to date of said termination.
7. **SAME—LEASE—SURRENDER—DEFENSE—BURDEN OF PROOF.**—The burden of proving the surrender of a written lease rests upon the defendant alleging such surrender.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. A. C. Baker, Judge. Affirmed.

The facts are stated in the opinion.

T. W. Johnston, for Appellants.

It was competent to show any acts, words, or conversation by the plaintiff and the defendants from which it may be

reasonably inferred that it was the intention of both that the written lease should be abandoned and the terms thereof rescinded. *Martin v. Stearns*, 52 Iowa, 347, 3 N. W. 92; *Hill v. Robinson*, 23 Mich. 25; *Witman v. Watry*, 31 Wis. 639; *Bedford v. Terhune*, 30 N. Y. 462, 86 Am. Dec. 394; *Amory v. Kanoffsky*, 117 Mass. 351, 19 Am. Rep. 416.

J. F. Wilson, for Appellee.

DAVIS, J.—This suit was commenced in the court of a justice of the peace of Prescott Precinct, Yavapai County, and on appeal was taken to the district court of said county, where it was tried at the November term, 1894. It is an action by the appellee to recover rents from the appellants, P. L. Kastner and Ellen J. Thorne, under the terms of a written contract. The complaint in substance alleges that on the thirtieth day of July, 1886, the appellee leased to the said appellants certain premises for a period of three years from September 24, 1886, at a monthly rental of one hundred dollars, payable in advance; that said lessees entered into the possession of said premises and occupied the same; but that on January 1, 1889, they violated the provisions of the lease by refusing to pay the rent for that month, and it is for this installment of rent that Campbell sues. Attached to the complaint is a copy of the lease contract, a material feature of which is a provision that the lessor shall construct a building upon the premises of certain plans and dimensions, in consideration of which, and to aid in the construction thereof, the lessees were to advance the sum of five hundred dollars on rents. The lessees, Kastner and Thorne, by their answer, represent that they kept the premises from September 24, 1886, until March 24, 1888, when, as they claim, the lease ceased and determined, for the reason that said lessor, Campbell, had failed to complete the building as agreed by him, and had left it in an unfinished state, unsuitable for occupancy, and only worth fifty dollars per month rental; that from September, 1886, to March, 1888, the said lessees had paid eighteen hundred dollars in rents, in anticipation of the completion of said building, and are entitled to damages, which they ask to recoup against Campbell in this action. By way of further answer there is a denial of any indebtedness for rent, and an allegation of a new and verbal agreement, by

which Kastner alone continued in the occupancy of said premises under a tenancy at will, from March 24, 1888, to December 24, 1888, when he surrendered the possession thereof. Upon this state of the pleadings the case proceeded to trial before a jury in the district court, and on a conflict of evidence as to whether or not the building had been completed in accordance with the contract, and as to whether or not there had been a rescission and cancellation of the lease, the jury found for the plaintiff, Campbell, and returned a verdict in his favor for the amount claimed. Judgment was rendered against Kastner and Thorne (defendants) for the sum of one hundred dollars and costs, and from the judgment and order of the district court overruling their motion for a new trial they have appealed to this court.

The errors complained of are based upon the rulings of the trial court in excluding evidence and in giving and refusing instructions to the jury. In the appellants' brief they are conveniently grouped into two classes: 1. The refusal of the trial court to permit the defendants to prove various acts of both plaintiff and defendants, and have the same submitted to the jury in order that the question of the intention of the parties to surrender the lease might be inferred therefrom; and 2. The instructions of the court, claimed to be tantamount to asserting that no actions, words, or conversations of the parties could effect a surrender of the lease, but that it must be surrendered with the acquiescence and consent of plaintiff other than by acts and words.

It develops that on the trial the appellants sought to show, both in the direct examination of the lessee Kastner and the cross-examination of the lessor, Campbell, that the latter had taken possession of and reassumed control over said leased premises subsequent to the month of January, 1889, and before the expiration of the lease term; but that, upon objection, this line of testimony was excluded by the court. It is claimed by appellants that such conduct on the lessor's part, if shown, would be a fact to be considered by the jury in determining whether or not there had been a surrender of the lease by the appellants which the appellee had recognized and accepted. The action at bar is limited to the recovery of rent for the month of January, 1889. Any conduct on the part of the appellee tending to show a rescission of the lease at a later

date could not, as we view it, affect rights and liabilities already accrued, or be material in any way to the issues of this case. Again, the appellants offered to prove the service of notice by the lessee Kastner of his intention to leave the premises, and also other acts, solely upon his part, showing what he alone did towards surrendering the lease. There was not included in the offer the slightest avowal that these acts would be connected with any acquiescence, acceptance, or reciprocal conduct on the part of the lessor, and we think that under objection this evidence was also properly excluded. Text-writers agree that a surrender is the yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties. It is either in express words or by operation of law, through some act which implies that they have both agreed to consider the surrender as made. Decided cases are to the same effect. *Beall v. White*, 94 U. S. 382; *Bedford v. Terhune*, 30 N. Y. 458, 86 Am. Dec. 394.

The record further shows that objection was sustained to appellants' attempt to show a dissolution of partnership between Kastner and Thorne, and the removal of Thorne from said premises before January, 1889, with the knowledge of the lessor, Campbell, and this is claimed to be error, upon the theory that such testimony would tend to show a surrender of the lease. It is also contended, and for a similar reason, that the court erred in sustaining the objection to the following question asked the appellee, Campbell, upon his cross-examination: "Isn't it a fact that when you had this controversy with Kastner about the rent, and he wanted to pay you the rent and remove to the building which he had constructed, and which he had been forced to construct, that you declined to permit it?" We cannot conceive that the effect of this or any of the excluded testimony would be to show acts fairly tending to prove the surrender and rescission of the lease, and hence conclude that the rulings of the court in relation thereto were not prejudicial to the appellants.

Appellants complain of the instructions of the court. They are lengthy, and we do not deem it necessary to quote them *in extenso* here. An examination will not show them to be susceptible of the construction and effect given by appellants. It was the duty of the court in charging the jury to

give only such instructions as were pertinent to the evidence. The following instruction, slightly modified from the form in which it was requested by appellants, was adapted to the only theory of mutual rescission of the lease that had any support in evidence, and was as favorable to the appellants as the circumstances required: "If the jury believe from the evidence that said Kastner, just before he quit said premises, was occupying said premises alone under a verbal agreement with said plaintiff that he should pay therefor at the rate of \$100 per month, and that said agreement was to continue for no definite length of time, then said Kastner was, in legal contemplation, a tenant at will of said plaintiff, and could terminate said tenancy whenever he chose so to do, by giving to plaintiff reasonable notice of his said intention, and paying all rent due to date of said termination; and if the jury believe that said Kastner did so rent from plaintiff, so notify him of his intention to quit, did so quit, and did so pay plaintiff all rent due, then plaintiff cannot recover; provided, you find from the evidence that there was a surrender, and said Campbell accepted the surrender, of the original lease, and consented and agreed to such verbal lease; and such acceptance of a surrender of the original lease, if there was any, and consent, may be inferred from the words and acts of the parties thereto, if such acts and words showing such intention are proven. And, as I have said, the burden of showing such surrender of the written lease, if there was any surrender and acceptance thereof, rests upon the defendant." The charge of the court, as a whole, we think fairly and correctly presents the law bearing upon the issues tried, and was not calculated to mislead the jury. The record discloses to us no reversible error, and the judgment of the district court will be affirmed.

Street, C. J., Sloan, J., and Doan, J., concur.

[Civil No. 587. Filed October 1, 1898.]

[54 Pac. 577.]

**A. L. HENSHAW et al., Plaintiffs and Appellants, v. THE
SALT RIVER VALLEY CANAL COMPANY et al.,
Defendants and Appellees.**

1. **PLEADING — MULTIFARIOUSNESS — CODE PLEADING.**—The objection of multifariousness in a pleading is applicable under the code practice as under the ancient equity practice, and the same rules govern.
2. **SAME—SAME—DEFINED.**—By multifariousness is meant the improper joining in one bill of distinct and independent matters, and thereby confounding them,—as the joining in one bill of several matters perfectly distinct and disconnected against one defendant, or the demanding of several matters of a distinct and independent nature against several defendants in the same bill.
3. **SAME—SAME—MISJOINDER OF CAUSES OF ACTION — MISJOINDER OF PARTIES.**—An objection that a bill contains several distinct and disconnected matters against one defendant is, strictly speaking, one of misjoinder of causes of action, and an objection that a bill contains independent and distinct demands against several defendants is one of misjoinder of parties.
4. **SAME—SAME—WHEN ENFORCED.**—The rule which prohibits multifariousness in a pleading is based upon expediency, and is enforced when distinct matters are so intermingled as to embarrass the defendant in his defense or to render it impracticable for the court to frame a satisfactory decree.
5. **SAME—SAME—RAISED BY DEMURRER—OTHERWISE WAIVED.**—The objection to multifariousness in a complaint must be taken by demurrer; otherwise, it is waived.
6. **SAME—SAME—BILL MAY BE DISMISSED ON COURT'S OWN MOTION.**—The court may at any stage of the proceedings before judgment, of its own motion, dismiss a bill which contains the vice of multifariousness.
7. **SAME—SAME—DISMISSAL—DISCRETIONARY—APPEAL AND ERROR—REVIEW.**—The action of the court in dismissing a bill for multifariousness, whether on demurrer or of its own motion, is a matter of discretion, and will not be disturbed, unless substantial justice requires it.
8. **CORPORATIONS—STOCKHOLDERS' SUITS—IRRIGATION—PLEADING — COMPLAINT—CAUSES OF ACTION—JOINDER.**—In an action by minority shareholders against a corporation and its directors the complaint alleged that the defendant corporation was organized solely for the purpose of constructing and maintaining a ditch to divert and

carry water from the Salt River; that the shareholders who organized the corporation were at the time of its organization landowners and appropriators of water, and the purpose of the incorporation was to supply such lands with water so appropriated; that their several rights to water were retained by the shareholders, and the only property acquired by the corporation was the dam, canal, and its appurtenances; that the powers of the corporation were limited in the matter of charges to assessments upon the shareholders for the purpose of the maintenance of said canal; that the water appropriated at the time of the organization, six thousand six hundred and seventy inches, was then needed by the shareholders for the proper cultivation of their land, and that they were then entitled thereto; that a majority of the shareholders for four years prior to the filing of the complaint had united in interest, and their acts were adverse to plaintiffs and the others similarly situated; that said majority shareholders elected the directors and officers for the purpose of violating the corporate rights of plaintiffs, by diverting the water appropriated by plaintiffs into other canals for the benefit and in the interests of another canal company in which the majority shareholders and the officers and directors were shareholders; that the majority shareholders were intentionally neglecting and permitting the canal through which plaintiffs obtained their water to become filled up and its carrying capacity to become diminished so that plaintiffs were unable to obtain the water necessary for their lands, and were permitting the water which should have been diverted through said canal to be carried by other canals, for the gain and profit of the majority shareholders; that in furtherance of a plan to control defendant canal company for the benefit of said other corporation, defendants segregated the interests of the shareholders in the waters of Salt River from the land held by said shareholders by creating water-rights, which attempted to limit the right to the use of water, and thereby to diminish the amount to which the shareholders were rightfully entitled; that the majority shareholders caused defendant corporation to charge plaintiffs for the service of water independently of a levy of assessments for the maintenance of the canal; that the majority shareholders had sold a large number of shares to said other corporation, and had segregated the same from the land to which the water was appropriated, and had enabled said corporation to continue to control defendant corporation, for the pecuniary profit and advantage of the majority shareholders alone; that the defendant corporation had, with other canal companies, constructed another canal out of moneys assessed upon shares of plaintiffs, and had subscribed to the stock of said canal and held and voted the same; that defendants, in fraud of the rights of the plaintiffs, during the pendency of a certain suit to which the defendant corporation was a party, had entered into a secret agreement with other parties to said action whereby defendant company was deprived of the right to divert certain waters to the damage of plaintiffs; that

all of said acts were done against the protest of the plaintiffs, and that, although frequently demanded, defendants had denied plaintiffs any relief. The prayer was for an injunction against the continuance of the unlawful acts and for an accounting. *Held*, that as the complaint did not anywhere show that the shareholders had any right to the use of water through the defendant corporation's canal by virtue of their relation as shareholders of the company, the complaint stated two causes of action,—one for violation of the corporate rights of the plaintiffs, and the other for the violation of the personal rights of plaintiffs to the use of water through the canal of defendant company.

9. SAME—SAME—PLEADING—COMPLAINT—CAUSES OF ACTION — JOINDER — MULTIFARIOUSNESS.—A complaint on the part of the minority shareholders in an action where the plaintiffs are the same, the defendants are the same, and the relief sought is equitable in both causes of action, stating a cause of action for relief from corporate wrongs and a cause of action for enforcement of personal rights, is not multifarious, where there is no such inconsistency or repugnancy in the various rights declared on as to cause confusion or embarrassment to the court in administering the relief which the facts might warrant were separate suits brought for the enforcement of the several rights.
10. PLEADING — PARTIES — NON-JOINDER OF PARTIES—OBJECTION, HOW RAISED — DISMISSAL, WHEN WARRANTED — ORDERING ADDITIONAL PARTIES TO BE BROUGHT IN—RIGHT TO REOPEN CASE—TRIAL WITHOUT OBJECTION—DISMISSAL PREJUDICING RIGHTS OF PLAINTIFFS—APPEAL AND ERROR—REVIEW—RELIEF.—Where many of the grievances complained of by plaintiffs involved the transactions of persons not parties to the action, such defect, if raised by the pleadings, might properly be held to be sufficient reason for the dismissal of the action. Otherwise, the court has the power to order such persons brought in and made parties defendant before entering a decree. The fact that, had such parties chosen, they would have had the right to have had the entire case reopened in so far as their rights were involved, with the attendant inconvenience and expense to the remaining defendants, in the absence of any other consideration, would justify the trial court in dismissing the action as a proper exercise of judicial discretion. But in an action involving the rights of third persons, tried without the objection of want of parties being raised, the trial court should have ordered new parties defendant to have been brought in instead of dismissing the action where such dismissal operates oppressively upon the plaintiffs and to their substantial disadvantage, as where the grievances complained of are such as make it probable that the bar of the statute of limitations might be successfully interposed were plaintiffs required to bring a new action; and in case of such dismissal this court will correct the action of the trial court and vacate the order, and grant leave to plaintiffs either to file a

supplemental bill bringing in additional parties defendant or to amend the complaint so as to render this unnecessary, as they shall elect.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Reversed.

William Herring, for Appellants.

The pleadings in all courts of record shall be by complaint and answer. Rev. Stats., par. 653.

The complaint may contain several different causes of action. Rev. Stats., par. 653.

The complaint shall set forth a full and clear statement of the cause of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which is requested of the court. Rev. Stats., par. 668; Bliss on Code Pleading, 3d ed., sec. 5.

Only such causes of action may be joined as are capable of the same character of relief. Rev. Stats., par. 670.

The judgment of the court shall conform to the pleading, the nature of the case proved, and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Rev. Stats., par. 793; Bliss on Code Pleading, sec. 161.

Provisions in the Code of Procedure, so far at least as the codes have abolished the distinction between legal and equitable forms of proceeding, are applicable alike to legal and equitable actions. 7 Am. & Eng. Ency. of Plead. & Prac., p. 816; *Blatchley v. Coles*, 6 Colo. 82.

The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in. Rev. Stats., par. 727.

This provision of the code requiring the court to order such parties brought in is held to apply particularly to actions which under the old practice would have been suits in equity. *Chapman v. Forbes*, 123 N. Y. 532, 26 N. E. 3. And such provision is mandatory. *Robinson v. Kind*, 23 Nev. 330, 47 Pac.

1, 977; Maxwell on Code Pleading, 373; Pomeroy on Remedies and Remedial Rights, 419.

In courts of equity bills are not multifarious where the matters set forth are intimately related as parts of a fraudulent scheme or transaction. *Duff v. First National Bank*, 13 Fed. 65; *Conley v. Buck*, 28 S. E. 97; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Norris v. Haggin*, 28 Fed. 275; *Stafford National Bank v. Sprague*, 8 Fed. 377; *United States v. Pratt Coal etc. Co.*, 18 Fed. 708; *Mills v. Hurd*, 32 Fed. 127; *Dykman v. Keeney*, 21 App. Div. 114, 47 N. Y. Supp. 352.

C. F. Ainsworth, for Appellees.

That the complaint in this case is multifarious, see the following authorities: Story on Equity Pleading, secs. 271, 280, 530; Bliss on Code Pleading, secs. 110, 289, 290; *Brown v. Guarantee etc. Co.*, 128 U. S. 412, 9 Sup. Ct. 127, 32 L. Ed. 468; *Young v. Cushing*, 4 Bliss, 458, Fed. Cas. No. 18156; *Beasley v. Shiverly*, 20 Or. 508, 26 Pac. 846; *Mallow v. Hinde*, 12 Wheat. 194, 6 L. Ed. 599.

Where there are several necessary defendants, some of whom are within the jurisdiction of the court and some not, the court cannot pass a decree; and the court is not helped in such case by the act of Congress of 1839, nor by the forty-seventh equity rule; and although a case had been pending for thirteen years, it was dismissed by the supreme court of the United States when it reached that tribunal, because all the parties necessary to a final decision were not before the court. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158. See, also, *Ribon v. Railroad Cos.*, 16 Wall. 450, 21 L. Ed. 367; *Bell v. Donihoe*, 17 Fed. 710; *Northern Indiana R. R. Co. v. Michigan Central Co.*, 15 How. 244, 14 L. Ed. 674; *Coiron v. Millaudon*, 19 How. 115, 15 L. Ed. 575.

SLOAN, J.—Plaintiffs brought this suit in the district court of Maricopa County upon the fourth day of May, 1895, to obtain relief in equity against certain wrongs alleged to have been committed by the defendant the Salt River Valley Canal Company, and by the defendants J. W. Evans, W. F. Fulwiler, and M. E. Hurley, as directors of said company. The complaint, as originally filed, was divided by the pleader into five causes of action. Subsequently the complaint was

amended by the addition of another cause of action. These divisions were purely artificial, inasmuch as the matters alleged in the first so-called cause of action were made a part of the second, and the matters alleged in the second made a part of the third, and likewise each subsequent cause of action was made to include all matters previously incorporated in the foregoing causes of action. Disregarding, for the sake of convenience and brevity, these artificial divisions, and discarding unnecessary verbiage, the amended complaint contained the following averments:—

It was alleged that the defendant the Salt River Valley Canal Company was duly incorporated on the sixth day of September, 1875; that the object of the incorporation was to carry on and conduct the business of supplying a portion of the Salt River Valley, in the county of Maricopa, with water for irrigation and for milling, manufacturing, and mechanical purposes, and to this end, and for these purposes, to purchase, construct, and build or dig such canals, ditches, or flumes as may be necessary to convey water from Salt River, taking it from said river at a point at or near the head of the old ditch used by the Swilling Irrigating Canal Company, and conveying said water to such point or points in the above-described valley of the Salt River as may be necessary for the disposal or use of the said water; that the capital stock of said company, as fixed by the incorporators, was twenty thousand dollars, divided into forty shares of the par value of five hundred dollars each; that subsequently such capital stock was increased to twenty-five thousand dollars, and the shares divided into fifty, of the par value of five hundred dollars each. It was further alleged that the purpose of the incorporation was to divert by means of the company's canal water previously appropriated by the shareholders at a time or times when they respectively were owners, occupants, or possessors of lands in said territory, and that the said corporation was also organized by said shareholders in order that they might more efficiently and economically avail themselves of their respective appropriations of water and protect their respective interests and rights which they had severally acquired in relation to the use of water for the necessary cultivation and irrigation of lands along the Salt River which they or their predecessors or grantors had acquired, owned, occu-

pied, or possessed for the purposes aforesaid. Plaintiffs further alleged that the rights in and to said water and the use thereof so acquired by plaintiffs, their grantors and predecessors in interest, have ever since been vested in, and are now vested in, said respective shareholders in said canal company; that the property acquired by said corporation at its formation were the structures constituting the Salt River Valley Canal dam, Salt River Valley Canal, its appliances appurtenant thereto, and other property and effects of said corporation used in maintaining and operating said canal; that the said rights, respectively, of the shareholders of, in, and to the waters of Salt River have never rightfully or lawfully become the property of said corporation; that the powers of said corporation, its directors and its officers, were and are limited in relation to pecuniary charges or assessments upon the several shareholders of said corporation for the purposes only of maintaining, constructing, and operating said canal and appurtenant ditches so as to duly divert and convey the waters aforesaid to the lands aforesaid of the shareholders of said corporation. It is further alleged that at the time of the construction of the Salt River Valley Canal, and at the time of the organization of the company, the carrying capacity of said canal was about 6,670 inches of water; that this amount had been duly appropriated by the shareholders at the time of the organization of the company, and said quantity of water was then needed by them, and has ever since been required by them for the necessary and proper cultivation of their arable and irrigable lands; and that the said shareholders each and every year since the incorporation of said company have been, and are now, entitled to divert by means of said canal from Salt River said amount of water, which amount has ever since been, and now is, necessary for the proper and necessary irrigation and cultivation of said lands. It was further averred that the defendants Evans, Fulwiler, and Hurley were the legally elected and acting directors of the corporation, constituting the board of directors thereof. Plaintiffs further alleged that a majority of the shareholders of said company for at least four years prior to the filing of the complaint had united in interest, and in their acts were adverse to and antagonistic to plaintiffs and others similarly situated, who during said period constituted the minority

shareholders of said corporation; that said majority shareholders elected officers and directors of the company from among them with the intent and purpose of violating the corporate rights of plaintiffs and other shareholders similarly situated; that the violation of said rights consisted in the continuous and wrongful taking and diversion of the water of the Salt River, which the plaintiffs and others similarly situated had duly appropriated and were rightfully entitled to have conducted and carried by the Salt River Valley Canal, and which they required for the cultivation and irrigation of their lands; that said majority shareholders and said officers and directors united in interest and in acts for the purpose of promoting and advancing the interests of an association known as the Arizona Canal Company and the interests of a corporation known as the Arizona Improvement Company, in each of which said majority shareholders and said officers and directors are shareholders, and each of which is controlled and managed by said majority shareholders, said officers and directors. It was further averred that the Arizona Canal Company since in or about the year 1885 had wrongfully and unlawfully assumed and exercised corporate functions, and since said year continued to assume and exercise corporate functions in constructing, maintaining, and operating a canal in said county of Maricopa for the purpose of obtaining water from the Salt River, and that at the time of the construction of the said canal the directors of said association did not own or possess arable and irrigable lands which were cultivated with said water, or upon which the water conducted by said canal was used, or was required to be used, for irrigation. It was also alleged that said majority shareholders of the Salt River Canal Company, for the purpose of promoting the interests of the Arizona Canal Company and the Arizona Improvement Company, and for their own benefit and gain, since about the month of May, 1888, continuously practiced a systematic encroachment upon, and a violation of, the rights of the plaintiffs and others similarly situated, by various means, plans, and devices, and have wrongfully and unlawfully injured the plaintiffs in their corporate rights, and deprived plaintiffs of their said corporate rights, in said Salt River Valley Canal Company; that among these means, plans, and devices is an intentional neglect of the structure known

as the "Salt River Valley Canal," and the two arms thereof, known, respectively, as the "Dutch Ditch" and the "Montgomery Ditch"; that this neglect consisted in permitting the said canal and ditches to be filled up by a growth and accumulation of vegetation, and by the deposit therein of earth and vegetable matter, so as to materially obstruct, retard, and diminish the flow of water therein, so that the rightful capacity of said canal to carry water has been diminished and reduced more than one third, and that amount of water which rightfully should have been conveyed and conducted to the lands of the shareholders of the Salt River Valley Canal Company was wrongfully diverted into the Arizona Canal by the defendants for the exclusive benefit of said majority shareholders, and to the great injury of plaintiffs and others similarly situated; that these acts of said majority shareholders, if persisted in, and the failure to perform said duty, if continued, will constitute a danger and continuous injury to the rights and appropriations of plaintiffs, respectively, and others similarly situated, of, in, and to the waters of Salt River made and required by said shareholders as aforesaid; that the quantity of arable and irrigable land owned and cultivated by the shareholders of said corporation which requires water of the Salt River to be diverted thereto and thereon for the purpose of cultivation was twenty thousand acres; that all the water of the Salt River which the rightful capacity of said canal would enable it to carry was needed for the proper cultivation of said lands, yet notwithstanding the said corporation, its officers and directors, against the repeated protests and objections of plaintiffs and other shareholders of said corporation similarly situated, had failed, refused, and neglected to permit said canal to carry said amount of water so required as aforesaid, and which was available, and which could have been diverted into said canal from the said Salt River. The complaint further averred the particulars wherein, during the irrigating seasons from May 15, 1891, up to and including the time of the bringing of the suit, the defendants had failed and refused to permit the full amount of water to flow in said canal, and had diverted from said river, and specified the maximum amounts which were permitted to flow in said canal during said seasons; and that these amounts were insufficient for the needs and require-

ments of plaintiffs and others similarly situated in the cultivation of their said lands.

Plaintiffs further alleged that they and those similarly situated with them have repeatedly complained to the said corporation, its officers and directors, of the aforesaid failures and refusals to permit the amount of water required and needed by them as aforesaid to be diverted from said river into and to be conducted by said canal. And have repeatedly notified said corporation, its officers and directors, that they needed and required said water for the purposes aforesaid, but that notwithstanding said complaints, expostulations, and notifications, said corporation, its officers and directors, have wrongfully and unlawfully, and in violation of the obligations and duties which devolved upon them, and in violation of the rights of plaintiffs and other shareholders similarly situated, failed and refused to remedy the wrongs so complained of as aforesaid. And they, for their own pecuniary gain and profit, permitted other and antagonistic corporations to divert and use the waters of Salt River which plaintiffs and others similarly situated were entitled to and should have had conducted to them by means of said Salt River Valley Canal; that said plaintiffs and others similarly situated did petition the said defendants for the redress of the grievances suffered and complained of, and did submit the said petition to a meeting of the shareholders of said corporation held upon the 15th of May, 1894, and that upon said occasion a majority of the shareholders of said corporation, its officers and directors, denied the redress demanded by said minority shareholders. It is further alleged that the majority shareholders of the Salt River Valley Canal Company combined wrongfully and unlawfully with the two corporations known as the Arizona Improvement Company and the Arizona Canal Company, their officers and directors, and with the officers and directors of certain other canal companies, to control the said Salt River Valley Canal Company for the benefit of said Arizona Canal Company, and to that end devised the scheme and plan, and in violation of the rights of said minority shareholders, of segregating and disassociating the interests of the shareholders of said Salt River Valley Canal Company in the waters of Salt River which they had duly acquired from the lands held, owned, possessed, and occupied by them,

respectively, under said canal, for the purposes of cultivation, and in pursuance of said scheme, plan, and combination said majority of said shareholders did cause to have on or about the 23d of May, 1888, passed and adopted a resolution by which it was claimed and provided that certain restrictions and limitations were imposed on the shares of all the shareholders of said corporation, and upon their rights, respectively, to the use of water which had been duly appropriated by them, and which was duly acquired by them as aforesaid, and which resolution provided, in effect, that one hundred and fifty water-rights should be divided and distributed to the shareholders of the corporation by way of dividends, which water-rights were to be conveyed to and vested in the several holders thereof by deeds of conveyance, and which were to be distinct and separate from the shares of stock held by said shareholders; and that the plan and purpose of this was to unlawfully and fraudulently restrict the several appropriations of water which the said shareholders were lawfully entitled to under their said appropriations, and as provided by the organization of said company; that said plaintiffs, although having refused and declined to surrender their shares in said corporation under said resolution, have nevertheless been compelled by defendants to submit to said plan of supplying water required by them, respectively, for the irrigation and cultivation of their lands, and as a result of said plan and scheme have had the water to which they were justly entitled greatly diminished in amount, and by said action of defendants the crops and lands of plaintiffs have been greatly injured and damaged; that as a further result of said plan and scheme plaintiffs and others similarly situated have been compelled to purchase of the defendant corporation for a money consideration, in each irrigating season, the right to the use of water for irrigating their lands under said canal which they are lawfully entitled to under their appropriations, and independently of the payment of any consideration to defendants except the lawful assessments and charges ordinarily arising in the business of maintaining and operating the said dam and canal. It is further alleged that the majority shareholders of the defendant company have wrongfully and unlawfully caused a large number of the shares of the Salt River Valley Canal Company to

be sold and transferred to the Arizona Improvement Company, and have claimed to segregate the same from the lands cultivated under said canal for which said water was appropriated, and that the holders of said shares, by holding the same wrongfully and unlawfully, controlled the management of the said Salt River Valley Canal Company, and annually continued to operate said scheme and plan, and annually elected the officers and directors of the Salt River Valley Canal Company and various other canal companies, including the Arizona Canal Company and the Arizona Improvement Company; that since the adoption of the said resolution the said majority shareholders of said defendant company have continuously divested plaintiffs and other shareholders similarly situated of their rightful use of the water of said Salt River, and have diverted the same into the Arizona Canal, when the same was needed and required for plaintiffs and others similarly situated, to lands not entitled to the use of the same lying under the Arizona Canal, claiming water from the Arizona Canal Company, to the pecuniary profit and advantage of said majority shareholders, and have made large profits from the sales of water to parties who had no right to the same. It is further charged in the complaint that the said majority shareholders of the defendant company, its officers and directors, in excess of the corporate powers of the said defendant company, and in violation of law, and to the injury of the rights of plaintiffs and others similarly situated, and for purposes of pecuniary profit, have entered into certain unlawful leases, agreements, contracts, and other written instruments for the use of water of the Salt River which had been duly appropriated by, and the use of which belongs to, the shareholders only of the Salt River Valley Canal Company. It is further charged in the complaint that the said officers and directors of the defendant company, in connection with others, fraudulently and unlawfully constructed a canal known as the "Crosscut Canal" out of moneys assessed upon shares of plaintiffs and other shareholders of said company, and have subscribed to the stock of said Crosscut Canal and Power Company, held, voted, and used said stock to the extent of one sixth of the capital stock of said Crosscut Canal and Power Company. It is further charged and alleged that the said defendant company, its officers and

directors, have unlawfully authorized and permitted the said Arizona Improvement Company to publicly advertise the control and domination of the defendant company to be in the said Arizona Improvement Company, and have permitted the said last-named company to use the franchise of the defendant company, its property, interests, effects, and rights, for the benefit and advantage of said Arizona Improvement Company, and to the great damage and injury of the defendant company and its franchise, and to the damage of plaintiffs and other shareholders of said corporation similarly situated; and have further permitted the diversion during the winter months of what was known as the "winter water," and to which shareholders of the said defendant company were entitled, to be diverted upon lands of persons not shareholders of the defendant corporation, and thereby diminishing the flow of water in said Salt River Valley Canal, and when plaintiffs and others similarly situated required said water for the purposes aforesaid; and that defendants threatened to continue the wrongful and unlawful acts complained of. It was further charged that the defendants, in fraud of the rights of the plaintiff and others similarly situated, during the pendency of a certain suit to which the defendant company was a party plaintiff, entered into a certain secret agreement with the other parties to said action, wherein and whereby it was sought to deprive the Salt River Valley Canal Company of rights to the use of water of the Salt River which the court in said suit had awarded the defendant company; and that said agreement was made without authority, and in pursuance of the scheme and plan on the part of the said majority shareholders, its officers and directors, to divest plaintiffs and other shareholders of the Salt River Valley Canal Company of their rights to the same; and that if said agreement be permitted to be carried into effect, it will be productive of great and irreparable damage and injury to the plaintiffs.

The prayer of the complaint was, in substance: 1. That the defendants be enjoined from diverting water of the Salt River required by plaintiffs and others similarly situated to others not shareholders in the Salt River Valley Canal Company, and who do not own or possess lands under said company; 2. That the resolution adopted by said defendant company and all acts of said defendant company having for

their purpose and aim the segregation of the appropriations of water made by the shareholders of the defendant company from the ownership and the control of the lands owned or possessed by said shareholders or their grantors or predecessors in interest be declared null and void; 3. That the powers of the said defendant company under its franchise be declared to be limited, restricted, and confined to the maintenance of the dam and canal known as the "Salt River Valley Canal," and of the structures necessary and required to convey the waters of the Salt River which the various shareholders of said corporation are rightfully entitled to; and be further restricted and confined to the care and maintenance of the same, and to the operation of the same for the purpose of carrying and conveying the waters aforesaid; 4. That said defendants be enjoined from levying charges, collecting or receiving moneys or other consideration from the respective shareholders of said defendant company, except in due proportion thereof as may be needed for reasonable and proper compensation of the officers of the company, and for the liquidation of other lawful corporate charges and expenses for the maintenance and operation of said canal and dam; 5. That an accounting be had of the moneys derived or received by said majority shareholders from the sale or rent of water of the Salt River of which plaintiffs and others similarly situated have been wrongfully deprived, when they were entitled to and required the same for the cultivation and irrigation of their lands; 6. That an accounting be had for the moneys derived or received by the defendant company and said majority shareholders for the sale or rent of said water to said minority shareholders, and that it be ascertained what the excess of said amount of money is over the rightful amount properly and lawfully charged against them for the maintenance and operation of said canal, and that said excess be repaid to these plaintiffs and others similarly situated; 7. That all certificates of shares of stock not owned and held by persons or corporations who are inhabitants of the territory of Arizona, and owners, occupants, or possessors of arable and irrigable lands for cultivation and irrigation on which the waters of Salt River are required to be carried by, or may be lawfully diverted through, the said Salt River Valley Canal, be declared null and void, and in excess of the cor-

porate powers of said corporation to issue; 8. That all agreements, resolutions, or acts by which defendant company became incorporator and member of the Crosscut Canal and Power Company, and by which the corporate funds of the defendant company were subscribed and appropriated to the purchase of shares of capital stock of said Crosscut Canal and Power Company, be declared null and void; 9. That the directors of the defendant company be enjoined and restrained from acting as directors of the Arizona Canal Company or the Arizona Improvement Company; 10. That the defendants be forever enjoined and restrained from selling, leasing, or renting the waters of the Salt River which the shareholders of the defendant company are entitled to, need, and require for the cultivation and irrigation of the lands owned or possessed by them; 11. That it be further decreed that all contracts and agreements heretofore made by the defendant company, its officers or directors, in relation to the sale, lease, rent, or use of the water aforesaid, be rescinded, and that the defendant company be forever enjoined from the further performance or recognition of the same; 12. That the injunctions prayed for herein be made perpetual; that plaintiffs recover the costs and disbursements in the action, and for general relief.

The answer of the defendants contained: 1. A general demurrer to the effect that the complaint did not state facts sufficient to constitute a cause of action; 2. A general denial.

A referee was appointed by the court for the purpose of hearing and taking the testimony in the cause, and to report and submit the same when taken. On October 28, 1895, the cause came on for hearing upon the report of the referee, and on February 1, 1897, the cause was finally submitted to the court for its decision. On July 12, 1897, the court, on its own motion, dismissed the complaint without prejudice to the right of the plaintiffs to bring a new action. From this action of the court the appellants bring this appeal.

The reasons assigned by the trial court for the dismissal of the action were: First, that the complaint was multifarious, in that it contained several separate and distinct causes of action; second, because of a defect of parties defendant. The objection of multifariousness in a pleading is applicable under the code practice, which provides for but one form of action for suits at law and in equity as under the ancient

equity practice, and the same rules govern in the one case as in the other. "By multifariousness is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demanding of several matters of a distinct and independent nature against several defendants, in the same bill." Story's Equity Pleading, sec. 271. The objection that the bill contains several distinct and disconnected matters against one defendant is, strictly speaking, one of misjoinder of causes of action; and the objection that a bill contains independent and distinct demands against several defendants is one of misjoinder of parties. But whether the multifariousness in the bill be of the one kind or the other, the rule which prohibits it is based upon expediency, and is enforced whenever distinct matters are so intermingled as to inconvenience and embarrass a defendant in his defense, produce delay, or cause unnecessary trouble and expense to a party in litigating matters with which he has nothing to do. It has also been enforced in some instances when the court finds it impracticable or difficult to frame a satisfactory decree owing to the contradictory or repugnant nature of the several matters declared upon. The proper method of raising the objection of multifariousness in a complaint is by demurrer, and if the objection is not so taken the defect is waived. The court may, however, *sua sponte*, at any stage of the proceedings before judgment, dismiss a bill which contains the vice of multifariousness. Whether a bill which is multifarious be dismissed upon demurrer or by the court upon its own motion, the action of the court is held to rest in sound discretion, and will not be disturbed unless substantial justice requires it.

Is the complaint in this action multifarious? It is apparent from a reading of the complaint that in the mind of the pleader the grievances complained of centered in and about the conduct of the Salt River Valley Canal Company, its officers and directors, in relation to the plaintiffs, first, as shareholders of the company, and second, as appropriators of water. It is averred that at the time of the organization of the Salt River Valley Canal Company its original stockholders were the owners of arable and irrigable lands of the

Salt River Valley, and had made valid appropriations of water from the Salt River for the irrigation of the same; that the company was organized by said appropriators for the single purpose of building and maintaining a conduit through which they might efficiently and economically have delivered to them from the Salt River their several appropriations of water; that the powers of the corporation were limited by its organization to the construction, maintenance, and operation of the structures constituting such conduit, and the levy and collection from its shareholders of such charges as would be necessary for such purposes, and no more. It is distinctly averred that the corporation did not, at the time of its organization, and has never since, acquired any interest in the various appropriations of water made by the shareholders, nor any right to limit, restrict, control, sell, divert, or otherwise dispose of the water which the various shareholders of the company, as appropriators, owned, held, or possessed, as owners of arable and irrigable land; but that, on the contrary, the only property owned, held, or possessed by the company since its organization was and is the dam, canal, and its various arms, constituting the conduit for the diversion and carriage of the water appropriated as aforesaid by said shareholders. It is not averred in the complaint, nor does it anywhere appear, that the shareholders of the corporation have any right to the use of water through the company's canal by virtue of their relation as shareholders of the company. Nor is it at all clear just what are the relations of the plaintiffs as appropriators of water with respect to the company. The complaint fails to make clear whether the company, by reason of some contractual relation originating outside of and apart from the corporate relation, owes a duty to each shareholder to deliver to him through the company's canal the water which his appropriation entitled him to. It is asserted, however, in the complaint, that the shareholders, as appropriators, possess the right to the use of the company's canal for the irrigation of their lands; but whether this right rests in contract or is one which the law will imply is not averred nor made clear by any allegation in the complaint. If the right to have water carried by the company's canal and delivered upon particular land be merely an incident to the ownership of stock in the company, and not a matter of individual con-

tract with the company, then a violation of this right is a breach of the obligation existing between the corporation and its stockholders, and is to be remedied by an action in the nature of a stockholders' suit. But if, on the contrary, it be a matter apart from the corporate relation, then its violation is merely a breach of contract, and the remedy must be sought for in a suit for the enforcement of an individual right. Doubtless it might have been provided in the articles of incorporation that the right to have water conveyed for the irrigation of particular lands through the company's canal should be an incident to the ownership of stock in the company, but we do not read the complaint as implying this to be the case. It is averred: "That the object of said corporation was to carry on and conduct the business of supplying a portion of the valley lying upon the north side of Salt River, in the county of Maricopa and territory of Arizona, and in the vicinity of the town of Phoenix, with water for irrigation, and for milling, manufacturing, and mechanical purposes, and to this end, and for this purpose, to purchase, construct, and build or dig such canals, ditches, or flumes as may be necessary to convey water from Salt River, taking it from said river at a point at or near the head of the old ditch used by the Swilling Irrigating Canal Company, and conveying said water to such point or points in the above-described valley of the Salt River as may be necessary for the disposal or use of said water." It cannot be inferred from the foregoing excerpt from the complaint that the right to the use of water is an incident to the ownership of stock. Again, it is asserted in the complaint that the company, by its organization, is limited to the construction, maintenance, and operation of the company's canal as a conduit for water needed and required for the irrigation of plaintiffs' lands. It is also asserted that the company may not charge for this service a greater proportionate amount from any stockholder than will reasonably be sufficient for the maintenance and operation of the company's property. They also deny that the company has any power to derive revenue from any other source, and the attempt of the company to do this is made a cause of complaint. The right of the company to the control and disposition of the water which it carries other than to supply the plaintiffs as appropriators is denied. The right of a stockholder, as such, is

necessarily limited by the rights of the company. And if, therefore, the company has no property interest in the water diverted and carried by it, then a stockholder, as such, can have no such right. And the failure of the company, therefore, to divert and carry water which may be needed by appropriators, whether they be stockholders or not, cannot properly be said to be a violation of the duty which the company owes to its shareholders by reason of the corporate relation. The right, therefore, to the use of water through the canal of the defendant company must be construed, from the averments of the complaint, to be a personal one, resting not on the corporate relation, but on contract, to be enforced as an individual right. The averments that the defendants were unlawfully diverting water to the use of which plaintiffs were entitled, and are wrongfully depriving the latter of their right to the use of the same in the irrigation of their lands, must be held to constitute a cause of action distinct and severable from any contained in those averments which show misconduct on the part of the defendant company and its officers in the wrongful assumption of corporate powers and in the wrongful management and disposition of the corporate property.

The complaint does, therefore, contain two causes of action. But are these necessarily inconsistent or repugnant? The plaintiffs are the same and the defendants are the same in the cause of action for the enforcement of individual rights and in the causes of action for the enforcement of corporate rights, and they each call for equitable relief. Thus far no rule of equity or code pleading is violated. The complainants, however, in seeking to correct and remedy abuses in the exercise of corporate powers by the defendant company and its officers, and to restrain the *ultra vires* acts of said company and its officers, sue in right of the corporation, and thus may, in a sense, be said to sue in a representative character. Such a suit is, in effect, one brought by the corporation. In seeking to enforce their right as appropriators of water, plaintiffs are suing in their individual capacity. To this extent there is a misjoinder in the technical sense that plaintiffs in the two classes of action do not sue in the same right. It is not, however, the mere fact that several causes of action are united in the same suit which the plaintiffs may bring in different rights that will make a complaint bad by reason of

multifariousness. There must be such an inconsistency or repugnancy in the various rights declared on as to cause confusion and embarrassment on the part of the court in administering the relief which the facts might warrant were separate suits brought for the enforcement of the several rights. An examination of the complaint does not disclose any inconsistency or repugnancy in the enforcement of the plaintiffs' rights as stockholders and as appropriators of water. If plaintiffs' averments be true, the redress sought by them in their rights as stockholders against the defendant company and its officers, if granted, will not in any wise interfere with the granting of the relief sought by plaintiffs as appropriators of water. On the contrary, the granting of the former will, in effect, be in aid of the latter.

It is undoubtedly true, as pointed out by the trial court, that many of the grievances complained of by plaintiffs involve transactions in which third parties, not made parties to the action, are involved, and whose rights may be vitally affected were the court to attempt to adjudicate upon them. Had this defect been raised by the pleadings, it might properly be held to be a sufficient reason for the dismissal of the action. This was not done, and the defendants chose to go to trial upon the issues without suggesting such defect, or asking that the new parties defendant be added. Under the statute the court had the power to order these parties brought before it and made parties defendant before entering a decree which might operate to their prejudice. And if the new defendants thus brought in had chosen, they would have had the right to have the entire case reopened in so far as their rights were involved. They undoubtedly would have had the right to plead *de novo*, and to a trial *de novo*, so far as the issues involved affected their interests in the suit. This might have caused some inconvenience and added expense to the other defendants, which, in the absence of any other consideration, should properly be controlling, and would have justified the action of the trial court in dismissing the action as a proper exercise of judicial discretion. If, however, the dismissal of the action by the trial court should operate oppressively upon the plaintiffs, and to their substantial disadvantage, even though at fault in omitting to make proper parties defendants, it is our duty not only to review the action of the trial court, but as well to correct it.

Many of the grievances complained of are of many years' standing, and it is not only probable, but altogether likely, that the bar of the statutes of limitations might be successfully interposed were plaintiffs required to begin new actions. Upon this ground alone we hold that, instead of dismissing the action, the court should have ordered new parties defendant to be brought in and the cause determined either upon the pleadings as they stand or upon such amendments as might be allowed. Nor could the defendants now before the court well complain of this, inasmuch as they did not see fit to raise either the question of multifariousness or defect of parties by demurrer, but permitted the testimony to be taken upon the issues as made by the pleadings, and the case to come to a hearing upon its merits, without objecting upon either of those grounds. Upon the whole record, and under the view we take of the possible injury which may accrue to plaintiffs from the dismissal of the suit, we feel compelled to reverse the action of the court below. In justice to the trial court, it is only fair to say that the possibility that any of plaintiffs' causes of action would be barred were plaintiffs required to bring new actions was not called to its attention.

So far as the judgment of the court below in the matter of costs is concerned, it will not be disturbed. But the order of the court dismissing the action is vacated, and leave granted to the plaintiffs either to file a supplemental bill bringing in additional parties defendant or to amend the complaint so as to render this unnecessary, as they shall elect.

Doan, J., and Davis, J., concur.

[Civil No. 609. Filed October 1, 1898.]

[54 Pac. 584.]

HENRY HUNING, Plaintiff and Appellant, v. J. E. PORTER et al., Defendants and Appellees.

I. IRRIGATION—APPROPRIATION — ACTIONS — PRIORITIES — DECREE—PRO-RATING.—In an action to determine relative rights to the use of water from a common source for irrigation, where the decree speci-

fies the several rights, and that one right is prior to another, it is error for the court to decree that in seasons of scarcity the water shall be prorated.

2. ~~SAME—SAME—SAME—SAME—FINDINGS—SUFFICIENCY OF WATER FOR ALL—IMMATERIAL.~~—A finding in an action to determine relative rights to the use of water that up to the time of the filing of the complaint there had been sufficient water at all times in the common source for plaintiff and defendant is immaterial, as that fact furnishes no assurance that there will continue to be such sufficiency; and when the relative priorities in which the rights exist are determined, it is immaterial whether or not the stream furnishes a sufficiency for all.
3. COSTS — IRRIGATION — ACTIONS — COMPENSATION OF WATER COMMISSIONER—EACH PARTY TO PAY HIS OWN COSTS—DISCRETION OF TRIAL COURT—APPEAL AND ERROR—REVIEW.—The compensation of water commissioner goes as a matter of costs. Costs are by statute placed largely in the discretion of the court, and the order that each party pay his own costs will be permitted to stand, as this court will not review the action of the lower court in the disposal of costs unless in a case of evident and gross abuse of such discretion.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Navajo. J. J. Hawkins, Judge. Modified.

T. W. Johnston, for Appellant.

Herndon & Norris, for Appellees.

This action was a chancery or equity proceeding, and it is universally held that in such proceedings allowance or disallowance of costs is discretionary, and not the subject of error, and, whether they are granted or withheld, are but as incidents to and no part of the relief sought. *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *Gray v. Dougherty*, 25 Cal. 267; *Stocker v. Hutter*, 134 Pa. St. 19, 19 Atl. 566.

DOAN, J.—This action was instituted on June 19, 1894, in Apache County, and was tried on December 4, 1895, in what was then Navajo County. The action was brought by plaintiff, Huning, to enjoin the defendants from the use of the waters of Show Low Creek. There were at the institution of the suit certain affidavits filed in support of the petition, and

a bond furnished, upon which a temporary injunction was issued forbidding defendants from using or diverting any of the waters of Show Low Creek proper, or any of the tributaries thereof, upon the plaintiff's claim that he was entitled to the entire flow of the stream, as being the first appropriator thereof for the purpose of irrigation. There were several separate defendants, who set up several separate defenses, each claiming the right to the use of a certain portion of the waters of said creek or its tributaries. At the institution of the suit only a part of the residents on the creek and users of water therefrom were made defendants, but afterwards all of the inhabitants living above plaintiff and appellant on Show Low Creek who had been cultivating lands and using water and whose rights would be affected were brought in and made parties defendant, in order that the complete adjudication of the rights of all of the parties concerned might be had. The defendants had been cultivating several different tracts of ground, aggregating an entire acreage of about three hundred acres, having begun the cultivation of the several tracts at different times during the previous eight years; while the plaintiff (and appellant) was cultivating about one hundred acres, which had been in continuous cultivation by himself or his predecessor and grantor since 1874. Upon the trial of the case, eighteen issues were submitted to the jury, on which the jury returned their special findings on December 10, 1895. The court thereupon found and filed findings of fact, and entered a decree and judgment in conformity therewith, from which judgment and the order denying a new trial the plaintiff appealed, and brings the case to this court. The findings and decree were quite voluminous, and there were many issues decided affecting the several defendants and their several rights relative to the plaintiff and appellant herein; but the only questions that will be considered by this court will be those that have been raised by the assignments of error on the part of the appellant.

The jury found: First, that the plaintiff and his grantor were the first in point of time to divert and use for purposes of irrigation the waters of Show Low Creek; second, that the time of such diversion, appropriation, and use was in 1874; third, that plaintiff had at the time of trial ninety-four acres of land under irrigation and cultivation, and that it would

require fifty-nine miners' inches of water to irrigate it; fourth, that defendants had prior to June 19, 1894, interfered with and interrupted the use by plaintiff of the amount of water necessary to properly irrigate his said land; fifth, that none of said defendants had for five years continuously prior to the bringing of this suit, June 19, 1894, enjoyed the uninterrupted use of said water adverse to the plaintiff; sixth, that plaintiff had continuously irrigated about ninety-four acres of land since his residence upon it; seventh, that the Scott Brothers were at the time of the suit cultivating and irrigating from the waters of Show Low Creek sixty and three fourths acres, which would require to properly irrigate said land about thirty-seven miners' inches.

The court, from the findings of the jury and the evidence introduced in the case, found, among others, the following facts: First, that the first actual appropriation of the waters of Show Low Creek was made some time in the year 1874, by the predecessors of Henry Huning in the occupancy of the land now occupied by him, and who are grantors to him of his right to occupy and possess said land; that said appropriation of said water was actual, and accompanied by the construction of proper ditches and flumes, and had continued without legal interruption from that date until the time of trial, the same ditches and flumes in the same places as now being then used for the irrigation of the same land now occupied by and in the possession of the said Henry Huning, as described in his complaint in the case on trial; second, that plaintiff, Henry Huning, is cultivating ninety-four acres of land susceptible of irrigation, and which have been irrigated by plaintiff and his grantors from the waters of Show Low Creek; and that fifty-nine miners' inches of water are required to properly irrigate the same; third, that said defendants R. and J. Scott are, of all the parties to this action, entitled to the second right to use the waters of the said creek for domestic and irrigating purposes, and are in possession of and cultivating sixty and three-fourths acres of land susceptible of irrigation, and which have been irrigated by the waters of Show Low Creek, requiring thirty-seven miners' inches of water to properly irrigate the same; that it is not intended to find that plaintiff and defendants R. and J. Scott have any priority of right to the waters of said creek, but there has at all times

been sufficient water in said creek for plaintiff and said R. and J. Scott; fourth, that no one has had with the knowledge and acquiescence of the said plaintiff the open, peaceable, continuous use, adverse to said plaintiff, of any of the waters of said Show Low Creek which were required and needed by plaintiff for the irrigation of the said land, for more than five years consecutively preceding the date of this action—to wit, June 19, 1894.

The judgment of the court, based upon the foregoing findings of the court and jury, contained, among others, the following decretal provisions: “(A) That all the parties to this action to whom is accorded and adjudged the right to use the waters of said creek are hereby required to properly prepare the soil, and to use the waters of said creek in the most economical manner possible; (B) That said Henry Huning and defendants R. and J. Scott do have the first right to the use and enjoyment of the waters flowing in said creek during the irrigating season; that the said Henry Huning do have the first right to the use and enjoyment of the waters flowing in said creek during the irrigating season for the irrigation of 94 acres of land now occupied and possessed by him, as aforesaid, in his said complaint, to the extent of 59 miners’ inches of such water as hereinbefore defined; and that each of said defendants, their agents, attorneys, and employees are hereby perpetually enjoined from diverting the waters of said creek in such a manner as to in any wise interfere with or interrupt the enjoyment of said first right to the use thereof during the irrigating season, as aforesaid, which is herein decreed to said plaintiff, Henry Huning; (C) That the said defendants R. and J. Scott do have and enjoy the second right to the use of the waters of said creek for the purpose during the irrigating season of irrigating the sixty and three fourths acres of land now possessed by them, and in their answer described, to the extent of 37 miners’ inches of water, as is hereinbefore defined, and that all the parties to this suit, and their agents, attorneys, and employees, are hereby perpetually enjoined from so diverting the waters of said creek during the irrigating season as to in any wise interrupt or interfere with their enjoyment of such right herein decreed to said R. and J. Scott; that neither plaintiff, Henry Huning, nor defendants R. and J. Scott shall have priority of right to the use of the

waters of said Show Low Creek, as above provided, but that they are entitled to prorate the flow of said stream in the above proportion in case of scarcity or failure in the flow thereof, so that each should fail to get, respectively, 59 and 37 miners' inches; (D) That said J. E. Porter do have and enjoy the third right to the use of water flowing in the east fork of said creek for the purpose of irrigating 44 acres of land now possessed by him to the extent of 27 miners' inches, as herein defined; that all the parties to this action, their agents, attorneys, and employees are hereby perpetually enjoined from diverting the use of said east fork during the irrigating season so as to interfere with or interrupt in any wise the enjoyment by said J. E. Porter of the right to use said water during said irrigating season herein decreed to him. If at any time said J. E. Porter shall show the court that he is in need of water, that plaintiff and said R. and J. Scott are getting more water under this decree than is required for their crops, then he may apply to this court or the judge thereof, as herein provided, for all necessary relief. . . . (G) That the \$100 due to said William Whipple for services rendered as water commissioner be paid by the parties to this suit in the following proportion, —to wit, one half by said Henry Huning, and one half by said defendants R. and J. Scott and J. E. Porter; and that unless the same be paid within thirty days from the date hereof, that execution issue for any balance due thereon in favor of said William Whipple against each and all of the parties owing said balance; (H) That each party to this suit pay his own costs."

The errors assigned by plaintiff are four, as follows: First, that the court erred in its judgment and decree rendered, in placing the defendants R. and J. Scott on a parity with the plaintiff in the use of the water awarded to them, when both the evidence introduced at the trial and the findings of the jury show that plaintiff, Henry Huning, is and was entitled to the prior right to the use of the water decreed him over said defendants R. and J. Scott; second, that the court erred in its judgment and decree in finding that the defendants R. and J. Scott and the plaintiff, Henry Huning, have no priority of right to the use of waters in said creek over the other defendants, and in finding, contrary to the evidence and verdict of the jury, that at all times there has been sufficient water in

the creek for said plaintiff and the defendants R. and J. Scott; third, that the court erred in decreeing that plaintiff should pay one half of the compensation awarded the water commissioner; fourth, that the court erred in decreeing that each party should pay his own costs, plaintiff having sustained all the material allegations in this complaint, was entitled to judgment against defendants for the costs by him expended.

The first error assigned presents the most important issue, if not in fact the all-important issue, in the case. The evidence in the case was conclusive and uncontradicted that Cooley, Huning's grantor, had secured the prior right to the waters in question for the irrigation of the quantity of land decreed Huning in this case, and that the same had been transferred by Cooley to Huning by deed of conveyance in proper form, and for a valuable consideration. The jury found that fact in plain language in their findings, as quoted herein. The court, in his findings of fact, found the same, and further found that the defendants R. and J. Scott were entitled to the second right to the use of said waters, for the purpose of irrigating sixty and three fourths acres of land, requiring thirty-seven miners' inches; and in the judgment rendered by the court, and based upon the evidence, and findings on the special issues by the jury, and the findings of fact by the court, the court decreed "that the said Henry Huning do have the first right to the use and enjoyment of the waters flowing in said creek for the irrigation of 94 acres, as described in his said complaint, to the extent of 59 miners' inches, and that each of said defendants are enjoined from diverting the waters of said creek in such a manner as to interfere with or interrupt the enjoyment of said first right to the use thereof, which is herein decreed to said plaintiff, Henry Huning." Following this, the court decreed: "(c) That the said defendants R. and J. Scott do have and enjoy the second right to the use of the waters of said creek for the purpose of irrigating $60\frac{3}{4}$ acres of land to the extent of 37 miners' inches, and that all parties defendant to this suit are enjoined from so diverting the waters as to in any wise interrupt or interfere with their enjoyment of said right herein decreed to said R. and J. Scott." In the light of the evidence in the case, and the findings of the court and jury, the decrees above quoted are cor-

rect; and the further decree "that the said Henry Huning and defendants R. and J. Scott do have the first right to the use and enjoyment of said waters flowing in the creek," and "that neither plaintiff, Henry Huning, nor defendants R. and J. Scott, shall have priority of right to the use of the waters of said Show Low Creek, as above provided, and that they are entitled to prorate the flow of such stream in the above proportion in case of scarcity or failure in the flow thereof, so that each should fail to get, respectively, 59 and 37 miners' inches," are contradictory to and inconsistent with the decrees first quoted, are unsupported by the testimony, and should be eliminated from the judgment. The testimony in the case, the findings of the jury, as well as the findings of the court, clearly determined that Henry Huning had the first right to the amount of water decreed to him; and the court, in its judgment, recognized that fact, and decreed that he "had, and should have and enjoy, the first right to" that amount of water for the purpose of irrigating that acreage of land, after which it was error to decree that the Scott Brothers were on a parity with him, and that he enjoyed no priority as to them.

It is assigned as further error that the court found in its decree that the defendants R. and J. Scott and the plaintiff, Henry Huning, have no priority of right to the use of waters in said creek over the other defendants, and in finding, contrary to the evidence and the verdict of the jury, that at all times there had been sufficient water in the creek for plaintiff and defendants Scott.

The first error complained of in this assignment is incorrectly stated. The decree of the court did not decide that defendants R. and J. Scott and plaintiff, Henry Huning, had no priority of right as against the other defendants, but that they had no priority as against each other, thus putting them on a parity in the rights to use the water.

The second assignment is incorrectly stated, as no such decree is contained in the judgment, although the court did find among the findings of fact that there had at all times up to that date been sufficient water in the creek for plaintiff and defendants. That fact, however, is immaterial; and the court ignores it in the decree quoted above, wherein it provides that, in case of scarcity or failure in the flow of the creek Huning

and the Scotts should prorate the amount of water the creek might furnish. When the relative priority in which the rights exist is determined, it is immaterial whether or not the stream furnishes a sufficiency for all. The fact that the stream had before the date of trial furnished a sufficiency for all the parties litigant, or for a certain number of the parties litigant, would be no assurance that it would continue to furnish such sufficiency; and it is in order to provide for the proper distribution of the amount that may be furnished that the relative priority of the several rights enjoyed by the different parties are determined by the court.

The third and fourth assignments, maintaining that the court erred in decreeing that plaintiff should pay one half the compensation awarded the commissioner, and in decreeing that each party should pay his own costs, do not appear to be of sufficient importance to disturb the decision of the lower court. The compensation of the commissioner goes as a matter of costs in this case, and the costs in the case referred to in the fourth assignment are by our statute placed largely in the discretion of the court, and this court would not feel inclined to review or reverse the action of the lower court in the disposal of costs unless in case of an evident or gross abuse of such discretion.

The judgment of the district court should be modified by eliminating from the heading (B) thereof the first sentence, reading "that said Henry Huning and defendants R. and J. Scott do have the first right to the use and enjoyment of the waters flowing in the said creek during the irrigating season"; and by eliminating from the heading (C) of the said judgment the last sentence, reading "that neither plaintiff, Henry Huning, nor defendants R. and J. Scott shall have priority of right to the use of waters of said Show Low Creek, as above provided, but that they are entitled to prorate the flow of said stream in the above proportion in case of scarcity or failure in the flow thereof, so that each should fail to get, respectively, 59 and 37 miners' inches"; and by eliminating from heading (D) of said judgment the last sentence, containing the words, "If at any time said Porter shall show the court that he is in need of water, and that plaintiff and said R. and J. Scott are getting more water under this decree than required for their crops, then he may apply to this court or the judge thereof, as

herein provided, for all necessary relief." The judgment is therefore reversed and the case remanded, and the judge of the district court directed to modify the judgment as herein indicated and to enter judgment in the case as thus modified.

Street, C. J., and Davis, J., concur.

Sloan, J., took no part in this case, having been of counsel in the district court.

MEMORANDUM DECISIONS.

[Civil No. 555.]

THE OLD DOMINION COMMERCIAL COMPANY, Appellant, v. THE UNITED BLOGE MINES, a Corporation, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

Sniffen & Rice, for Appellant.

Edwards & Stoneman, for Appellee.

January 17, 1898. Affirmed.

[Civil No. 583.]

THE OLD DOMINION COMMERCIAL COMPANY, a Corporation, Appellant, v. M. W. NEEDHAM, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. Owen T. Rouse, Judge.

J. S. Sniffen, for Appellant.

Edwards & Stoneman, for Appellee.

January 17, 1898. Affirmed.

[Civil No. 600.]

A. L. JOHNS, Appellant, v. THE PHOENIX NATIONAL BANK, a Corporation, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

A. J. Daggs, for Appellant.

L. H. Chalmers, for Appellee.

January 18, 1898. Dismissed.

[Civil No. 601.]

A. J. Daggs et al., Appellants, v. THOMPSON WALKER
et al., Appellees.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

A. J. Daggs, for Appellants.

Millay & Bennett, for Appellees.

January 18, 1898. Dismissed.

[Civil No. 613.]

WILLIAM H. SUTHERLAND, Appellant, v. F. B. MALDO-
NADO, Appellee.

APPEAL from the District Court of the Second Judicial
District in and for the County of Pinal. Owen T. Rouse,
Judge.

No appearance for Appellant.

S. M. Franklin, for Appellee.

January 18, 1898. Affirmed.

[Civil No. 589.]

WILLIAM M. BILLUPS, Plaintiff in Error, v. SETH J.
JOHNSON et al., Defendants in Error.

ERROR to the District Court of the Third Judicial District
in and for the County of Maricopa. A. C. Baker, Judge.

R. E. Daggs and A. J. Daggs, for Plaintiff in Error.

W. H. Stilwell, for Defendants in Error.

January 19, 1898. Dismissed.

[Civil No. 562.]

THE ATLANTIC AND PACIFIC R. R. CO., Defendant, and
THE MERCANTILE TRUST COMPANY, and the
UNITED STATES TRUST COMPANY, Appellants, v.
THE DEFIANCE CATTLE COMPANY, Intervener
and Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. John J. Hawkins, Judge.

Herndon & Norris, for Appellants.

J. F. Wilson, for Appellee.

January 20, 1898. Affirmed.

[Civil No. 628.]

UNITED STATES OF AMERICA, Appellant, v. **WILLIAM C. DAWES et al**, Appellees.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. Richard E. Sloan, Judge.

E. E. Ellinwood, United States District Attorney, for Appellant.

J. F. Wilson, for Appellees.

January 31, 1898. Affirmed.

[Civil No. 629.]

C. A. NEWMAN, Appellant, v. **THOMAS M. VAUGHN**, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

No appearance for Appellant.

James Reilly, for Appellee.

January 31, 1898. Affirmed.

[Criminal No. 122.]

**ANASTACIO MORALES, Appellant, v. THE TERRITORY
OF ARIZONA, Respondent.**

APPEAL from the District Court of the Fourth Judicial District in and for the county of Coconino. R. E. Sloan, Judge.

George W. Glowner, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

February 23, 1898.

PER CURIAM.—In the district court, the defendant, Anastacio Morales, was tried and convicted of the crime of burglary. He appeals from the judgment rendered against him and from an order refusing him a new trial. It is contended for reversal that the trial court erred in refusing instructions offered by the defendant; but an inspection of the record fails to disclose what, if any, instructions were requested by the defendant, and an examination of all the instructions shown to have been given or refused satisfies us that the jury was properly charged as to the law of the case. We think the evidence fully supports the verdict, and find no error in any of the proceedings. The judgment is therefore affirmed.

[Criminal No. 128.]

**L. N. BARNES, Appellant, v. THE TERRITORY OF
ARIZONA, Respondent.**

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

No appearance for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

October 1, 1898. Affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1899.

[Criminal No. 133. Filed March 15, 1899.]

[56 Pac. 717.]

JOSIAH ANDERSON, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. **CRIMINAL LAW—APPEAL AND ERROR—CONFLICTING EVIDENCE—SCOPE OF REVIEW—TERRITORY V. MIRAMONTEZ, 4 ARIZ. 179, FOLLOWED.**—Where the evidence upon which the verdict of a jury is based is conflicting, this court cannot review its weight. It can look into it only to determine whether the court erred in not directing a verdict for the appellant, or in refusing to grant a new trial when there was no evidence to sustain the verdict. *Territory v. Miramontes, supra*, followed.
2. **SAME—SAME—VERDICT OF JURY—WEIGHT OF EVIDENCE—GROUND FOR NEW TRIAL—RULING DISCRETIONARY—WILL NOT BE REVIEWED WHERE THERE IS ANY EVIDENCE TO SUPPORT VERDICT.**—Where the verdict is manifestly against the weight of the evidence, it is a proper ground for a new trial, but the granting or refusing of such motion by the trial court is a matter of discretion that will not be disturbed by this court where any evidence to support the verdict was properly given to the jury.
3. **SAME—ASSAULT WITH INTENT TO COMMIT MURDER—EVIDENCE—SUFFICIENCY—JURY—PROVINCE OF.**—In a prosecution for assault with intent to commit murder, the testimony of the prosecuting witness was that the defendant, without provocation or excuse, fired at him with a six-shooter at a distance of forty-five steps, and other witnesses testified that defendant had said he would shoot the prosecuting witness if he saw him. The defendant testified that he shot at the prosecuting witness with a revolver, but stated that it was after witness fired at him with a shot-gun. A witness, who heard the firing, testified that the first report was a pistol-shot, and the later ones gun-shots. The testimony was certainly sufficient to go to the jury, and, if believed, to support the verdict. The weight of this evidence, and the extent to which it was con-

tradicted or explained away, were questions exclusively for the jury, and will not be reviewed on appeal.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

Baker & Bennett, for Appellant.

C. F. Ainsworth, Attorney-General, and Joseph Campbell, for Respondent.

There being sufficient evidence in the record to be submitted to a jury, the rule is, that in order to set aside the verdict for the reason that the testimony does not sustain the verdict, it must be a clear case, one in which there is an absence of evidence against the prisoner or a decided preponderance of evidence in his favor. *People v. Ahloy*, 10 Cal. 301; *People v. Brown*, 29 Cal. 500; *Territory v. Booth*, 4 Ariz. 148, 36 Pac. 38..

A new trial will not be granted in criminal cases where the testimony is conflicting. *Territory v. Miramontez*, 4 Ariz. 179, 36 Pac. 35.

DOAN, J.—In this case the appellant was convicted of an assault with intent to commit murder. A motion for a new trial was made upon the ground that the verdict was contrary to the evidence, which motion was overruled and excepted to. This action of the court is assigned as error, and upon this error the appellant relies. The prosecuting witness testified: That he went to the place of the appellant in search of lost cattle; that he was armed with a Winchester shot-gun and a pistol; that he dismounted, in order to see the brand upon some cattle that were approaching; that “then Josiah Anderson came out ahead of the cattle, until he got opposite me, and when he saw me whirled his horse around, and he jerked out his pistol, and shot at me. At that his horse wheeled around, and he reined him up, and squared himself, and then I jumped, and got my gun and shot, just as he was going to fire the second time”; that the parties were about forty-five steps apart; that the witness Mullen then ran to his horse, and was about to mount the same, when the appellant again fired at him; that the witness Mullen returned the fire with

his pistol, and immediately mounted his horse and rode away; that the appellant was wounded in the right hand, and that the witness Mullen was not struck by either shot. Elmer Clanton, a witness who heard the shots fired, testified that the sound of the shots indicated different weapons; the first shot being that of a pistol, and the next succeeding two shots being those of a shot-gun. Three witnesses, Clanton, Evans, and Roberts, testified that upon one occasion, about one year prior to the shooting, the appellant made threats to shoot the witness Mullen if he should meet him. Another witness, Caruthers, testified that about eight months prior to the shooting appellant desired witness "to purchase a gun for him, and said that he was going to kill Mullen if he ever caught him on the range down there." The appellant, Josiah Anderson, James Kerrick, John Anderson, and Whitney testified for the defense. The appellant testified that he was engaged at his own place, with Kerrick and John Anderson, in branding cattle; that the cattle were turned out of a corral, going in one direction, and that he and James Kerrick and John Anderson went along the road in another direction; that none of them were armed, except appellant, who had a pistol (a 44 Colt's revolver); that in passing an opening in the brush he (appellant) was shot in the right hand by some person from the brush; that the effect of the shot was to disable his right hand; that the appellant did not fire at the witness Mullen until after Mullen had fired twice at him; that he then fired with his revolver once at Mullen, and afterwards once at the horse. The three other witnesses for the defense corroborated the appellant, and contradicted the witness Mullen.

The evidence is conflicting, it is true; but this court cannot review the weight of the evidence, and can look into it only to see whether there was an error in not directing a verdict for the defendant, or in refusing to grant a new trial when there was no evidence to sustain the verdict rendered. It has been held by this court in *Territory v. Miramontez*, 4 Ariz. 179, 36 Pac. 35, that "the appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence, when the testimony is conflicting, if there is any evidence to support the verdict." If the verdict was manifestly against the weight of evidence, that would afford defendant proper ground upon which to move for a new trial, but that motion

would be submitted to, and passed upon by, the judge of the lower court, who had heard the testimony, had seen the appearances and deportment of the several witnesses, and had noted the consideration given to them and their testimony by the jury; and the granting or refusal of such a motion by the trial court is a matter of discretion that will not be disturbed by the appellate court in any instance where any evidence to support the verdict was properly given to the jury. *Crumpton v. United States*, 138 U. S. 361, 11 Sup. Ct. 355.

In this case the testimony of the prosecuting witness is direct and positive that the defendant, without provocation or excuse, fired at him with a six-shooter, at a distance of forty-five steps. Other witnesses testified that the appellant had said that he would shoot Mullen, the prosecuting witness, if he saw him; that "he was going to kill Mullen, if he caught him on the range down there." The defendant testified that he shot at Mullen on this occasion with a 44 Colt's revolver, but states that it was after Mullen had fired at him with a shotgun; while Clanton, who heard the firing, testified that the first report was a pistol-shot, and the later ones gun-shots. This testimony was certainly sufficient to go to the jury for their consideration, and, if believed by them, to support a verdict. The weight of this evidence, and the extent to which it was contradicted or explained away by the witnesses for the defense, were questions exclusively for the jury, and will not be reviewed by this court on appeal. The judgment of the lower court is therefore affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 634. Filed March 15, 1899.]

[56 Pac. 734.]

JAMES REILLY, suing for the benefit of the County of Cochise, Plaintiff and Appellant, v. W. R. PERKINS et al., Defendants and Appellees.

1. RES ADJUDICATA—INTERLOCUTORY ORDERS—ORDER OVERRULING DEMURRER MAY BE RESCINDED AT ANY TIME PRIOR TO FINAL JUDGMENT.—An order overruling a demurrer to a complaint, being an

interlocutory order, is always under the control of the court until the final decision of the suit, and may be rescinded upon sufficient ground shown even after the term at which made, and is not therefore a final judgment to which only the doctrine of *res adjudicata* can apply.

2. PLEADINGS—COMPLAINT—FAILURE TO STATE CAUSE OF ACTION—DEFECT NEVER WAIVED—VACATION OF ORDER OVERRULING DEMURRER—JUDGMENT ON PLEADINGS.—The insufficiency of the facts stated in the complaint to constitute a cause of action is a radical defect which is never waived, and may be raised at any time, and the court can, upon cause shown, or its own motion, vacate its order overruling a demurrer thereto and then sustain such demurrer, or it can, after vacating such order, on motion, render judgment on the pleadings.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

James Reilly, and Allen R. English, for Appellant.

William Herring, and Barnes & Martin, for Appellees.

DOAN, J.—This action was brought in March, 1894, by appellant, Reilly, as a taxpayer, to recover, for the use of Cochise County, from the chairman and clerk of the board of supervisors, as individuals, the money that had been ordered paid by them from the county treasury to the clerk of the board of supervisors for services rendered by him as clerk of said board. After several demurrers by defendants and amendments by plaintiff, defendants filed a general demurrer and answer, on November 11, 1896, to plaintiff's second amended and supplemental complaint, and on the nineteenth day of November, 1896, the demurrer was submitted to the court and taken under advisement. On July 8, 1897, the court overruled the demurrer and continued the case for the term. On December 8, 1897, the personnel of the court and of counsel for defendants having changed in the mean time, the case came on regularly for trial; whereupon the counsel for defendants moved the court for a judgment for the defendants "on the facts alleged and admitted in the complaint," whereupon the plaintiff objected to the granting of said motion on the ground

that the matter thereof was *res adjudicata* by reason of the order of July 8, 1897, overruling defendants' demurrer to the complaint. This objection was by the court overruled, and the motion was granted, and judgment was rendered for defendants; whereupon plaintiff appealed from the ruling of the court.

The proposition of appellant, and the only one relied upon in this case and presented to this court, is the alleged error of the court in granting defendants' motion for judgment on the pleadings, upon the ground that the matter was *res adjudicata* by reason of the prior order of July 8, 1897, overruling defendants' demurrer to the complaint; and appellant submits that this error is sufficient to cause a reversal of the judgment. The point is not raised by the appellant that the court erred in granting the motion because of the sufficiency of the complaint. It is not, therefore, necessary to go into the merits of the pleadings. It seems to be conceded by the appellant that the complaint was not sufficient to support a judgment for the plaintiff; but appellant relies upon the proposition that the order of the court of July 8, 1897, overruling the demurrer, had become the law of the case, by which the court was yet bound, irrespective of the question whether such ruling was right or wrong, and, the grounds upon which the motion was based being the same as those upon which the demurrer was founded, that the ruling of the court aforesaid had removed them from the consideration of the court, and they were, on December 8, 1897, *res adjudicata*. The doctrine of *res adjudicata* amounts simply to this: That a cause of action once finally determined without appeal, between the parties on its merits, cannot afterwards be litigated by new proceedings, either before the same or any other tribunal. It is only, however, a final judgment upon the merits to which this doctrine applies. Until final judgment is reached the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar until the judgment, with its verity as a record, settles finally and conclusively the questions and issues. An interlocutory order or decree made in the progress of a case is always under the control of the court until the final decision of the suit, and may be modified or rescinded upon sufficient grounds shown at any time before final judgment, though it be after the term in which the inter-

locutory order or decree was given, and is not, therefore, a final judgment, to which the doctrine of *res adjudicata* can apply. *Foster v. The Richard Busteed*, 100 Mass. 412, 1 Am. Rep. 125; *Webb v. Buckelew*, 82 N. Y. 555; Black on Judgments, 308.

An order of the court sustaining or overruling a demurrer that is at the time under the control of the court, and can, upon cause shown or upon the court's own motion, be vacated and set aside, is not sufficient to remove or withhold from the consideration of the court any issue or fact. The insufficiency of the facts stated in the complaint to constitute a cause of action is a radical defect, and, like the want of jurisdiction is never waived, and can be raised at any time; and if fully satisfied that the complaint is insufficient to sustain the judgment prayed for or any judgment for the plaintiff, the court can vacate and set aside the order overruling the demurrer, and then sustain such demurrer, or can as well grant a motion for judgment on the pleadings, and render the judgment as prayed for in such motion. *Lawrence v. Ballou*, 37 Cal. 518. This being the only ground urged for reversal, the judgment of the lower court is therefore affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 632. Filed March 15, 1899.]

[57 Pac. 65.]

GEORGE E. TRUMAN, Plaintiff and Appellant, v. COUNTY
OF PINAL, Defendant and Appellee.

1. OFFICE AND OFFICERS—JAILER—POWER OF BOARD OF SUPERVISORS TO FIX SALARY—LAWS ARIZ. 1893, ACT NO. 87, CONSTRUED—REDUCTION OF SALARY—IMPLIED ACCEPTANCE—CANNOT QUESTION REASONABLENESS IN ABSENCE OF ALLEGATIONS ATTACKING GOOD FAITH.—Under the statute, *supra*, providing that the board of supervisors shall fix the compensation of the jailer, at not exceeding one hundred dollars per month, the board has the power to reduce the salary of the jailer during his term of office, and where such jailer continues to perform the duties of the office he impliedly accepts such reduction, and, in absence of any allegation impugning the good

faith of the board, is precluded from maintaining an action upon a *quantum meruit* against the county.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Fletcher M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

J. S. Sniffen, and Joseph H. Kibbey, for Appellant.

Whenever a consideration or compensation is mentioned, the law presumes it to be a reasonable one; and if no compensation is mentioned whatever, the person furnishing goods, materials, or services is entitled to a reasonable compensation. *City of Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674. "A corporation, like an individual, is held to a careful adherence to truth in its dealings with other parties, and cannot, by its representations or silence, involve others in onerous engagements, and then defeat the claims which its own conduct has superinduced." *Bissell v. Jeffersonville*, 24 How. 287.

The application of this principle to the case at bar is made apparent when we consider that at the time the plaintiff was employed as jailer, no compensation for his services was fixed by the board of supervisors, but he was paid his demands for four consecutive months thereafter. The statute not prescribing in what manner, at what time, or for what time, the board of supervisors should fix his compensation, the plaintiff had a right to believe his salary was so fixed at seventy-five dollars per month. After the position had been secured and no complaints or charges made against the plaintiff, it was an act of bad faith on the part of the board of supervisors to attempt to reduce his compensation to an unreasonable amount, and by so doing seek indirectly to oust him from his position, a power they do not possess under the law.

The identical question involving paragraph 2457 was determined by the supreme court of California in *Fulherth v. Stanislaus*, 67 Cal. 334, 7 Pac. 754, and the right of the plaintiff to maintain this character of suit was maintained.

The statute of Nevada declared (sec. 2139) that the sheriff be allowed to employ a jailer, and made it the duty of the county commissioners to allow a "fair and adequate compensation" for his services. Under that statute it was held

that the commissioners had no authority to fix the compensation on a per-diem basis and confine it to such times as prisoners were in jail; that if the commissioners rejected the claim for the jailer, it was for the district court to determine from the evidence what was a "fair and adequate monthly compensation." *Randall v. Lyon County*, 20 Nev. 35, 14 Pac. 583.

H. D. Cassidy, for Appellee.

Act No. 87 of the legislative assembly of 1893, entitled "An act to regulate the fees and salaries of certain county officials," provides: "That for the safe-keeping of prisoners confined in jail or under guard the sheriff shall be allowed to employ a jailer, whose compensation shall be fixed by the board of supervisors at not exceeding one hundred dollars per month. . . ."

It is well established that no liability can arise against a county, except upon an order of the board of supervisors as such, nor can such board impose upon the county any debt or liability, except in the manner provided by statute. *Hendricks v. Chautauqua County*, 35 Kan. 483, 11 Pac. 452; *Prudden v. Grant County*, 12 Or. 308, 7 Pac. 308; *Luden v. Case*, 46 Cal. 172; *Carrol v. Siebenthaler*, 37 Cal. 193; *County of San Joaquin v. Jones*, 18 Cal. 327.

A county, like a municipal corporation, is not liable in damages for the manner in which in good faith it exercises discretionary power of a public or legislative character. *Amperse v. City of Kalamazoo*, 75 Mich. 228, 13 Am. St. Rep. 432, 42 N. W. 821.

The statute, then, is the measure of the power of the board of supervisors, and to the extent of that power only can they bind the county.

The measure of the compensation of an officer is the law in force at the time the services were rendered. *Territory v. Clayton*, 5 Utah, 598, 18 Pac. 628.

The salary is but an incident of the office, and one taking and accepting an office is deemed to be familiar with the law or ordinance creating it, so that by accepting the position there is an implied contract for compensation. *Locke v. Central City*, 4 Colo. 65, 34 Am. Rep. 66; *City of Central v. Sears*, 2 Colo. 588; *Dillon on Municipal Corporations*, pars. 230-233.

As to a stipulated allowance, that allowance, whether an-

nual, per diem, or particular fees for particular services, depends on the will of the lawmakers, and thus whether it be the legislature of the state or a municipal body empowered to make laws for the government of a corporation. *Butler v. Pennsylvania*, 10 How. 439.

The complaint in the action is based upon and makes the direct allegation that the board of supervisors of the defendant failed and refused to fix any salary whatever as required under act 87, *supra*. The action is therefore based upon the theory of *quantum meruit* for the services rendered. The statute made it the duty of the board of supervisors of the defendant "to fix the compensation at not to exceed one hundred dollars per month." It is asked in this case that the court fix the compensation in the first instance, and in effect do that in an action on *quantum meruit* counts which it would not do in a *mandamus* proceeding. High on Extraordinary Legal Remedies, 348-350.

The right to compensation for services of an officer then exists, if it exists at all, by virtue of either a statute fixing the compensation, or a fixing by the act of a body or board authorized by law so to do. *Dysart v. Graham County*, 5 Ariz. 123, 48 Pac. 213; *Butler v. Pennsylvania*, 10 How. 439; *Rowe v. County of Kern*, 72 Cal. 353, 14 Pac. 11; *Dillon v. Whatcom County*, 12 Wash. 391, 41 Pac. 174.

DAVIS, J.—The appellant performed the duties of jailer for Pinal County from January 1, 1897, until January 1, 1898, under the employment of W. C. Truman, the sheriff of said county. At the time of entering upon the discharge of said duties the appellee's board of supervisors had fixed no salary or compensation for the services to be rendered by him; but for the months of January, February, March, and April, upon demand properly presented to the board, there was allowed and paid to him compensation at the rate of seventy-five dollars per month. On April 27, 1897, by an order duly made and entered upon its minutes, the board of supervisors fixed the salary of the jailer at fifty dollars per month, to take effect May 1, 1897, which order was not subsequently during said year modified or rescinded. The appellant, however, ignoring this action of the board, presented, at quarterly periods, his demands for services as jailer for the months

of May to December, inclusive, at the rate of one hundred dollars per month, upon which the board allowed and ordered paid the sum of fifty dollars per month, disallowing the claims as to the balance. The appellant refused to accept the allowance of the board in satisfaction of his demands, and on January 15, 1898, brought suit in the district court to recover the full amount of eight hundred dollars thereon, as the reasonable value of the eight months' services. The complaint sets forth a *quantum meruit* claim against the county, with no attack upon, or allegation respecting, the board's action of April 27, 1897, in fixing the salary of the jailer. This act of the board is pleaded as a defense in the answer, and is an admitted fact in the case, the controversy being only as to its legal effect. The cause was tried and determined in the lower court upon the theory that the board had the right to fix the jailer's salary, and, having done so, his recovery for services performed thereafter must be limited to the compensation thus provided. Upon the admissions of the answer, judgment was rendered in favor of Truman for the sum of four hundred dollars, and from that judgment he prosecutes this appeal. His reliance for a reversal is based upon the rulings of the trial court in excluding testimony tending to prove the reasonable value of his services as jailer, and that the salary fixed by the board for said services was not a reasonable compensation. Act No. 87 of the Session Laws of 1893 provides that "for the safe-keeping of prisoners confined in jail or under guard the sheriff shall be allowed to employ a jailer, whose compensation shall be fixed by the board of supervisors at not exceeding one hundred dollars per month." In so far as it affects the case at bar, we are of the opinion that the action of the board of supervisors in fixing the salary of the jailer at fifty dollars per month is a final and conclusive determination against the appellant, and is the sole measure of the compensation which he can claim. In fixing this amount, the board exercised discretion, the good faith of which, so far as the record shows, has never been, and is not now questioned. The rate of salary was established to take effect May 1st, and the continued performance of the duties of the position by the appellant during the succeeding eight months cannot be treated otherwise than as an implied acceptance by him of the new terms of compensation. There is no constitutional or statutory

limitation in this territory to prevent the decrease of an officer's compensation when it takes effect prospectively, nor was there any legal obligation resting upon the appellant which required him to continue in the performance of the duties of jailer at a salary which was not remunerative. The point has been urged upon us in this case, that, while it is the manifest intention of the statute to confer upon the sheriff, who is responsible for the safe-keeping of the prisoners, the authority to select and employ the jailer, it could not have been the intention of the lawmakers to also invest the board of supervisors with the power to practically deprive him of this privilege through an arbitrary adjustment of the compensation. The force of this argument is readily conceded, and we would not be understood as holding that an action of the board, taken arbitrarily, without investigation, or through prejudice, could not be reviewed in a direct proceeding, upon proper allegations; but the case before us presents no question of that kind. In this suit the appellant was not entitled to inquire into the reasonableness of the compensation, and the proffered testimony was rightly excluded. The judgment of the district court is affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 682. Filed March 15, 1899.]

[57 Pac. 64.]

SILVIS H. CHEDA, Plaintiff and Appellant, v. EDWARD M. SKINNER et al., Defendants and Appellees.

1. PLEADING—ANSWER—PAYMENT—NECESSITY FOR PLEADING ITEMS—REV. STATS. ARIZ. 1887, PAR. 742, CONSTRUED.—Paragraph 742, *supra*, providing that where defendant desires to prove any payment, he shall file with his plea an account, stating the nature of such payment and the several items thereof, or be precluded from proving the same, does not apply to a plea to an action on a note "that the defendant fully paid said plaintiff the amount due on said note."
2. STATUTES—ADOPTION—WITH CONSTRUCTION OF THE COURTS OF THAT STATE.—Where a statute has been adopted from the code of

another state, by implication, it was adopted with the construction which has been theretofore placed upon it by the supreme court of that state.

3. APPEAL AND ERROR—RECORD—EVIDENCE—PRESUMPTIONS—GLENCCROSS v. EVANS, 4 ARIZ. 222, AND SCOTT v. HURLEY, ANTE, P. 85, CITED.—Where the evidence is not preserved in the record, an appellate court will presume that a state of facts was proved in the trial court authorizing the rulings and judgment. *Glencross v. Evans*, and *Scott v. Hurley*, *supra*, cited.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

H. M. Willis, for Appellant.

The plea of defendant does not allege the payment plainly and particularly so as to give plaintiff full notice of the character thereof, nor has there been filed an account showing the character or items thereof. Therefore, it appears that the court clearly erred in permitting the evidence of payment to be introduced over plaintiff's objection. Rev. Stats. 1887, par. 742; *Hann v. Broussard*, 3 Tex. Civ. App. 481, 23 S. W. 88.

C. F. Ainsworth, for Appellees.

The ruling of the court in regard to the admission of evidence of payment is sustained by the supreme court of Texas in the case of *Able v. Lee*, 6 Tex. 428.

The record in this case does not purport to contain all the evidence, but, on the contrary, there is no evidence in the record. In such cases the law is that the appellate court will presume that a state of facts was proved in the trial court authorizing the rulings and judgment, and where the record on appeal contains no statement of the evidence, it will be presumed, in order to sustain the judgment, that every fact was proven which could have been legally proved under the pleadings. *Scott v. Hurley*, ante, p. 85, 53, Pac. 578; *Evans v. Glencross*, 4 Ariz. 222, 36 Pac. 212; *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557; *Tatum v. Massie*, 29 Or. 140, 44 Pac. 494; *Antisdell v. R. W. Co.*, 26 Wis. 145, 7 Am. Rep. 44; *Wood v. R. R. Co.*, 49 Mich. 370, 13 N. W. 779; *Railway Co. v. Williamson*, 58 Kan. 814, 49 Pac. 157.

Where there is no bill of exceptions and no transcript of the evidence, it will be presumed that there were no objections to the evidence below, and the appellate court will refuse to consider questions arising thereon. *White v. White*, 86 Cal. 219, 24 Pac. 996; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125.

PER CURIAM.—The appellant sued the appellee upon a promissory note. There was a plea of payment, the allegation being “that long prior to the commencement of this action the defendant fully paid said plaintiff the amount due on said note.” The cause was tried before the court without a jury, and the appeal is from a judgment rendered in the defendant’s favor.

Two specifications of error are presented: 1. That the court erred in overruling the plaintiff’s objection to the introduction of evidence in support of the defendant’s plea of payment; and 2. That the judgment is contrary to the evidence. To sustain his first proposition, the appellant relies upon the requirements of paragraph 742 of the Revised Statutes, and insists that the fact of payment was not so pleaded as to lay the foundation for the introduction of any evidence under the plea. The paragraph referred to provides that “in every action in which the defendant shall desire to prove any payment, counterclaim or set-off, he shall file with his plea an account stating distinctly the nature of such payment, counterclaim, or set-off, and the several items thereof; and on failure to do so, he shall not be entitled to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.” This provision came to us from the Texas code, and, by implication, we adopted it with the construction which had been theretofore placed upon it by the supreme court of that state. In the case of *Wells v. Fairbank*, 5 Tex. 582, where there was a plea of payment, alleging in general terms that the debt had been “paid off and discharged,” the statute was held applicable only where it was proposed to prove “items” of payment. In *Able v. Lee*, 6 Tex. 428, there was a general allegation of payment “since the institution of this suit.” In discussing the question the court said: “The plaintiff excepted to the plea of payment, but his exception was overruled, and rightly. To constitute a valid plea of payment, it was not necessary that

there should have been filed with the plea a bill of particulars showing items of payment. Proof of the payment of the debt in money (presumably at one time and in one amount) would have been admissible under the plea, and would certainly have constituted a valid defense. But when evidence was offered of payment in lands, if the plaintiff had objected to its introduction his objection must have been sustained, and the evidence excluded." In the case at bar there is no bill of exceptions, and no transcript of the testimony. As the evidence is not preserved in the record, we cannot know the nature of the proof given in support of the defendant's plea of payment. Under these circumstances, an appellate court will presume that a state of facts was proved in the trial court authorizing the rulings and judgment. 2 Ency. of Plead. & Prac. 441; *Evans v. Glencross*, 4 Ariz. 222, 36 Pac. 212; *Scott v. Hurley*, ante, p. 85, 53 Pac. 578; *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557; *Tatum v. Massie*, 29 Or. 140, 44 Pac. 494; *Railway Co. v. Williamson*, 58 Kan. 814, 49 Pac. 157; *Wood v. Railway Co.*, 49 Mich. 370, 13 N. W. 779. The appellant's second specification of error is disposed of by these same authorities, and the judgment of the district court is affirmed.

[Criminal No. 134. Filed March 15, 1899.]

[56 Pac. 971.]

JOSEPH DICKSON, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. LIVE-STOCK SANITARY BOARD—CERTIFICATE OF RECORDING BRAND—DATE OF RECORDING—SUFFICIENCY—LAWS ARIZ. 1897, ACT NO. 6, SECS. 49, 50, CONSTRUED.—A certificate of a cattle-brand issued by the live-stock sanitary board, under the provisions of section 49, *supra*, making it *prima facie* evidence of ownership of cattle bearing such brand in prosecutions under the statute, or under the laws of the territory in regard to the unlawful disposition of animals of the bovine kind, complies with the requirements of section 50, *supra*, and authenticates the date of the recording of the brand; where it recites "that the same has been recorded at 4:30 P. M. o'clock on the day, month and year below written, to wit: [designated brand for cattle]. Given under my hand and seal this 29th day of April, 1897."

2. **APPEAL AND ERROR—RECORD—REVIEW—JURY—PREJUDICIAL REMARKS NOT IN RECORD—ERROR PREDICATED ON.**—Prejudicial remarks of an attorney, made in an argument to the jury, not preserved in the record, will not be reviewed.
3. **CRIMINAL LAW—LARCENY OF CALF—FELONIOUS INTENT—EVIDENCE—SUFFICIENCY.**—Where the evidence showed that a stray cow and calf, both of the same color, the calf unmarked, the cow branded "B," which defendant knew to be the brand of the prosecuting witness, had ranged in the vicinity of defendant's corral for some time; that on the day the larceny was committed the defendant and his employee roped and took the calf into the corral and left it there, without branding, with other cattle; that the Blair cow followed it to the corral, and the next morning bellowed till the defendant's brother and the employee turned the calf out, when it went off with the cow to the owner; that defendant testified that he did not know whose calf it was and did not look for its mother, and therefore did not brand it; that others testified the cow and calf had been around there for six or seven months, and that the cow was looking on when defendant took the calf away, it is sufficient to justify the jury in inferring a felonious intent in the taking of the calf, and a verdict of guilty will not be disturbed.

APPEAL from a judgment of the district court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

T. W. Johnston, for Appellant.

C. F. Ainsworth, Attorney-General, and H. D. Ross, District Attorney, for Respondent.

Where there is any evidence to go to a jury on a controverted fact upon the question as to whether the defendant committed the alleged crime or not, and the jury has passed upon this question, this court will not review their finding. *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097; *People v. Ross*, 115 Cal. 233, 46 Pac. 1059; *People v. Durant*, 116 Cal. 179, 48 Pac. 75; *People v. Bennett*, (Cal.) 50 Pac. 703; *Jones v. People*, 2 Colo. 351; *State v. Kronert*, 13 Wash. 623, 43 Pac. 876.

DAVIS, J.—The defendant, Joseph Dickson, was tried at the June term, 1898, of the district court of Yavapai County, upon an indictment charging him with the crime of grand

larceny. He was convicted and sentenced to a term of two years' imprisonment in the territorial prison. The appeal is from the judgment of conviction and from an order denying the defendant's motion for a new trial.

The subject of the alleged larceny was a certain calf, the property of one Robert Blair. The assignments of error made by counsel for appellant are classed in his brief under three heads: 1. The admission of incompetent evidence; 2. Prejudicial remarks of the district attorney in his closing argument to the jury; and 3. That the verdict and judgment are not supported by the evidence. The first error assigned by the appellant is, that for the purpose of proving the ownership of the animal alleged to have been stolen, the territory was permitted to introduce in evidence, over objection, what purported to be a certificate from the secretary of the live-stock sanitary board of Arizona Territory of the registration of the brand of Robert Blair in the territorial brand-book, but which certificate, it is claimed, was lacking in a material particular,—namely, the date at which said brand was recorded with the sanitary board. Act No. 6 of the Session Laws of 1897, being an act "to codify and revise the laws with reference to live-stock," contains the following provisions relating to the recording of brands, and the effect thereof as evidence of ownership:

"Sec. 49. For the purposes of this act and in all the prosecutions arising under the same, or in the prosecution of any offense arising under the laws of this territory in regard to the unlawful taking, handling, killing, driving, or other unlawful disposition of animals of the bovine kind, . . . the proof of the brand by a certified copy of the registration thereof in the territorial brand-book, under the seal of the said board [live-stock sanitary board], certified to by its secretary, shall be sufficient to identify all . . . neat cattle, and shall be *prima facie* proof that the person owning the recorded brand is the owner of the animal branded with such brand.

"Sec. 50. At any time before the first day of July, after the passage of this act, it shall be the duty of persons, firms, companies, or corporations owning brands and marks, to file the same with the said board, and the said board shall record the same in a book of brands and marks, and shall furnish to the owners certificates thereof under the seal of the board, free

of charge, which said certificates shall be competent evidence of the registration of such brand and *prima facie* evidence of ownership. It is hereby made the duty of said board to transcribe in a territorial brand-book all of said brands and marks; thereupon all of said brands and marks shall be deemed to have [been] duly recorded in such territorial brand-book by the owners of said brands and marks. After said first day of July next, no one shall file any brand which has before that time been filed by another. With the brand offered for registration before July first aforesaid, the owner shall furnish a certificate of the recorder of his county that the brand so offered for registration is the recorded brand of the owner."

The certificate introduced in evidence, the admissibility of which was questioned, is in the following form: "No. 72. Territory of Arizona. Office of the Live-Stock Sanitary Board, Phoenix, Arizona. This is to certify that Robert Blair, of Prescott, county of Yavapai, Arizona, has filed in the office of the live-stock sanitary board a certificate, issued by the county recorder of Yavapai County, showing him to be entitled to the use of brands and marks below given, by virtue of a former statute, and that the same have been recorded at 4:30 P. M. o'clock on the day, month, and year below written, to wit: [Designated brand for cattle.] Given under my hand and seal, this 29th day of April, 1897. [Signed] Chas. W. Pugh, Secretary Live-Stock Sanitary Board. [Seal.]" The point is urged by the appellant that, inasmuch as the method of procedure prescribed for obtaining a certificate of brand prior to July 1, 1897, is different from that which was to be operative thereafter, the time of the actual recording of the brand is an essential element in the certificate; particularly in view of the dignity which the statute accords to a proper certificate, and the fact that this is a criminal prosecution. A determination as to the correctness of this position is unnecessary, in view of the interpretation which we give to the certificate in question. It is our opinion that the latter substantially complies with the requirements of the statute, and does, in fact, authenticate the date of the recording of the brand. Despite the somewhat faulty construction, we think the document, fairly and reasonably interpreted, declares the brand to have been recorded at 4:30 o'clock P. M., on the twenty-ninth day of April, 1897.

being the same day on which the certificate purports to have issued.

The second error assigned, predicated upon alleged remarks of the district attorney in his closing argument to the jury, relates to a question which is not properly before us for review. The appellant has failed to preserve in the record the remarks of which he complains, and we are thereby precluded from any consideration of their effect upon the jury.

It is urged finally, for reversal, that the verdict and judgment are not supported by the evidence. On the trial there seemed to be but little controversy over the main facts, the case hinging principally upon the question as to whether or not there was felonious intent. The evidence showed that the defendant lived at Skull Valley, which was a railroad station and post-office, and controlled a pasture inclosure within five hundred yards of the station, in which were confined cattle bearing his own brand of "J S"; that for some time prior to the twenty-seventh day of April, 1898, there had been ranging in the vicinity of the station a stray cow and calf, both being of a pale red, or buckskin, color, the calf unmarked, the cow branded "B," which was known to the defendant as the brand of Robert Blair, a stockman whose ranch was sixteen miles off; that in the afternoon of the above-mentioned day, the defendant assisted his employee, one Dick Hall, to rope and catch the calf referred to, and to lead it from a point near the station to defendant's pasture, into which they placed it, without branding, among other cows, steers, yearlings, and calves; that the Blair cow had followed at some uncertain interval, and appeared early the next morning at the outside of the inclosure, bellowing to the calf in a manner significant of the relationship, the calf being not more than six or seven months old; that soon thereafter the calf was turned out of the pasture by Hall and defendant's brother and went off with its mother; that, on the same day, both animals went into a round-up of cattle in that section, through the means of which they were returned to their owner. The law defines larceny as the felonious stealing, taking, carrying, leading, or driving away the personal property of another. Pen. Code, par. 762. The defendant, testifying in his own behalf, in his direct examination, explained that he put the Blair calf in his inclosure because

he thought it was his own. On cross-examination, he testified, in part: "Q. You say you never saw this calf you put in the pasture, before, in your life?—A. I might have seen it. I did n't pay any notice to it. I did not know who it belonged to—whose it was.—Q. You did not look for the mother when you saw it down there that day?—A. No, sir; I did not see its mother.—Q. You did not look for its mother?—A. No, sir.—Q. You were satisfied this was your calf when you put it in there?—A. No, sir; I did not know.—Q. Therefore, you did not mark it?—A. No, sir.—Q. You did not brand it?—A. I was not sure whether it was my calf or not." A witness for the defense, Hardy Miller, knew this particular cow and calf well. They had ranged together about the station and defendant's premises for six or seven months. It was a "B" cow. He had noticed them frequently, and had seen the calf when he was in defendant's company. William Duff Dickson, a witness for the prosecution, testified to having seen the Blair cow and calf pretty nearly every day about the station, and to have seen the cow standing by the roadside looking towards the calf while the latter was being led off by the defendant towards his own premises. Witness knew it was Blair's cow, because it had "B" on it. It is a well-settled rule that the intent with which a criminal act is committed need not be shown by direct proof, but may be inferred from what the party does, and also from all the facts and circumstances under which the act complained of was committed. We think there was evidence in this case from which the jury could reasonably have inferred that the taking of the calf by the defendant was with felonious intent, and that the verdict rendered was not therefore the result of passion or prejudice. The evidence may not seem to us of the most convincing character; but its sufficiency having been passed upon by the jury, who saw the conduct and demeanor of the witnesses, and by the district judge, who refused the motion for a new trial, we are not now justified, as an appellate court, in disturbing the verdict. We find no reversible error, and the judgment is affirmed.

Street, C. J., and Doan, J., concur.

[Civil No. 650. Filed March 15, 1899.]

[56 Pac. 969.]

OLD DOMINION COPPER MINING AND SMELTING
COMPANY, Defendant and Plaintiff in Error, v.
ALEXANDER ANDREWS, Plaintiff and Defendant in
Error.

1. PLEADING—SPECIAL MATTERS OF DEFENSE—NO NECESSITY FOR REPLY.
—A reply traversing special matters of defense set up in an answer is, under the practice in the territory, unnecessary.
2. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—OBJECTIONS FIRST RAISED ON APPEAL, WHERE PERMITTED, VIEWED WITH DISFAVOR—OBJECTION TO SUFFICIENCY OF COMPLAINT—SUSTAINED—MERE FORMAL DEFECTS DISREGARDED—REV. STATS. ARIZ. 1887, PAR. 673, CITED.—Where the record shows that the defendant interposed no demurrer to the complaint in the trial court, an objection that the complaint does not state facts sufficient to constitute a cause of action, made for the first time in an appellate court, is viewed with judicial disfavor, even though one which the law permits to be raised at any time, and under paragraph 673, *supra*, where the complaint states sufficient facts to give jurisdiction, we will not consider mere formal defects.
3. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—NOTICE OF DISCHARGE—TERM CONTINUES TILL NOTICE EXPIRES.—A provision in a contract which entitles the servant to notice of its termination is, in effect, an agreement to continue the term of service for that length of time after the notice, and the employer cannot dismiss the servant before the expiration of the full term without sufficient cause.
4. SAME—SAME—SAME—WRONGFUL DISCHARGE—REMEDIES.—When a servant is wrongfully discharged before the expiration of his term, he has his choice of two remedies: 1. He may treat the contract as continuing and recover damages for the breach thereof; or 2. He may treat the contract as rescinded, and sue on a *quantum meruit* for services actually rendered. He cannot maintain an action for his wages or salary except for past services performed.
5. SAME—SAME—SAME—SAME—ACTION FOR DAMAGES—COMPLAINT—SUFFICIENCY—APPEAL AND ERROR—OBJECTION FIRST RAISED ON APPEAL.—In an action for damages for breach of contract of employment, a complaint alleging a contract terminable only upon three months' notice; entry upon service and continuance therein until discharge without notice, without fault on plaintiff's part; refusal to continue plaintiff in the employment, although plaintiff had offered to so continue; refusal to pay plaintiff for time of

notice required, in violation of the terms of the contract, and damages to the extent thereof, sufficiently states a cause of action as against such objection first raised on appeal, as mere formal defects will not be considered where no demurrer has been interposed below.

6. **SAME — SAME — SAME — SAME — SAME — MITIGATION OF DAMAGES — EARNINGS DURING UNEXPIRED TERM.**—In an action for damages for breach of contract of employment, by the discharge of an employee before the expiration of the term, the defendant may show in mitigation of damages what the employee has been able to earn during the remainder of the term.
7. **APPEAL AND ERROR — REVIEW — EVIDENCE — SUFFICIENCY — WEIGHT AND PREPONDERANCE.**—Where there is evidence tending to prove every material fact necessary to be found to sustain the judgment of the district court, it is not the province of this court to weigh it or decide upon its preponderance.

WRIT OF ERROR from the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

E. J. Edwards, for Plaintiff in Error.

Plaintiff in error contends that the hiring was a monthly hiring, and as the defendant in error received payment for the entire month of July, he had no cause of action against it. *Saxonia Mining and Reduction Co. v. Cook*, 7 Colo. 569, 4 Pac. 1111.

The term of service not being fixed in the contract, the servant is presumed to have been hired for such a length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for a year; a hiring for a monthly rate is presumed to be for a month; a hiring at a daily rate, for a day. *Patterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Evans v. St. Louis*, 24 Mo. App. 114; *Prentiss v. Ledyard*, 28 Wis. 131; *Thomas v. Hatch*, 53 Wis. 296, 10 N. W. 393; *Beach v. Mullin*, 34 N. J. L. 343.

If the term is indefinite, as where the hiring is at a certain sum per month, for a term not exceeding five years, it is a monthly hiring. *Peacock v. Cummings*, 46 Pa. St. 434; *Whitcomb v. Gilman*, 35 Vt. 297; *Evans v. Bennett*, 8 Wis. 404.

The master has the right to discharge his servant for incom-

petency, no matter what the terms of the contract may be. The plaintiff testified that the agent of the defendant said that he discharged him for incompetency. The agent of the defendant testified that he discharged him for neglect of duty and incompetency.

The servant must not only possess necessary skill, but he is bound to use and exercise the same with reasonable care and diligence, and the only person who has the right to pass on that question is the employer. *Stoddard v. Treadwell*, 26 Cal. 294; *Parker v. Platt*, 74 Ill. 431.

Payment of salary due at time of discharge is a bar to further recovery. 3 Wait on Actions and Defenses, 600; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581.

George J. Stoneman, and J. S. Sniffen, for Defendant in Error.

DAVIS, J.—On the eleventh day of August, 1897, Alexander Andrews brought an action in the district court of Gila County against the Old Dominion Copper Mining and Smelting Company to recover damages for his alleged wrongful discharge from the service of the company. After alleging the residence of the parties and the corporate character of the defendant, the complaint contained the following averments: "That on or about the 5th day of November, 1896, plaintiff and defendant entered into a contract under and by virtue of which it was mutually agreed between the parties thereto that plaintiff was to enter the employ of defendant in the capacity of master mechanic at the mines owned and operated by defendant in Gila County, territory of Arizona, at a specified salary, in said contract stated, of \$200 per month, and that it was further in said contract stated and mutually agreed upon by the parties thereto that three months' notice should be given and required, unless waived by mutual consent, in the event that it should be desired by either party thereto to terminate the employment of plaintiff by defendant; that plaintiff, wholly relying upon the terms of said contract, in furtherance of the acceptance by him of the same did on or about the 1st day of December, 1896, enter the employment of the defendant in the capacity of master mechanic, as aforesaid, at a monthly salary of \$200, and ever since said last above-mentioned date, up to and including the

26th day of July, 1897, continued in defendant's employ in the manner and under the terms and conditions as hereinbefore in this complaint stated. And plaintiff further states that ever since the 26th day of July, 1897, up to and including the date of filing of this complaint, he has been ready and willing to continue in the employ of defendant, as hereinbefore stated, subject only to the three months' notice to be given and required as in said contract set forth. Plaintiff further states that on the 26th day of July, 1897, defendant, disregarding the terms of said contract, wherein three months' notice to quit should be given by defendant in case of a desire on its part to terminate said contract, and without any notice to plaintiff, discharged plaintiff from its employ, and refused, and still does refuse, to continue plaintiff in its employ, or to pay to him an equivalent in money of his salary of \$200 per month for three months; all of said acts on the part of defendant being without the fault, and against the wishes and consent, of plaintiff, and in violation of the terms of said contract. Plaintiff further states that on the 28th day of July, 1897, he notified defendant, through its agent, S. A. Parnall, that he was ready and willing to continue in the employ of defendant, but that defendant refused to permit plaintiff to comply with the terms of said contract, and still does refuse so to do, which refusal on the part of defendant is the occasion of a direct loss and damage to plaintiff in the sum of \$600, under the terms of said contract."

The amended answer of the defendant admitted its corporate character, and the residence of the parties, but denied generally all the other allegations of the complaint. It averred an employment of the plaintiff, which was to continue for a period not exceeding one year, and be conditioned upon competent and satisfactory service; alleged plaintiff's incompetency and neglect of duty, and that his discharge was based upon these grounds. These special matters of defense were traversed by a reply, although that was an unnecessary pleading, under our practice. The case was tried on December 2, 1897, without the intervention of a jury, and the court below made the following findings: 1. That on or about the date named in the plaintiff's complaint the plaintiff and defendant made a written contract, whereby the defendant was to pay the plaintiff the sum of two hundred dollars per month. as

master mechanic, to perform work and services in and about the defendant's business; 2. That the said contract contained an agreement to give and require notice, if needed, and that, in case of an emergency, the notice could be waived by mutual consent; 3. That on the twenty-sixth day of July, 1897, the plaintiff was discharged by the defendant, without any previous notice such as was provided for in said contract; 4. That during the three months next ensuing after his discharge, on the said twenty-sixth day of July, 1897, the plaintiff earned and received as wages, for his services, sums of money amounting to \$203.50. As a conclusion of law, the court decided that the plaintiff was entitled to recover from the defendant the sum of six hundred dollars, less the amount of \$203.50 so as aforesaid earned and received by him during said period of three months. Judgment was rendered in Andrews's favor for the sum of \$396.50, and the company, as plaintiff in error, brings the case to this court for review.

It is assigned for error that the complaint does not state facts sufficient to constitute a cause of action. The record shows that the defendant interposed no demurrer to the complaint in the trial court. An objection made for the first time in an appellate court is viewed with judicial disfavor, even though the objection be one which the law permits to be raised at any time. In *Gelston v. Hoyt*, 13 Johns. 575, Chancellor Kent said: "A party acts against good conscience, if he will not come forward and disclose his reasons, when called upon by the proper tribunal, but reserves himself for another court, and for the cold, hard purpose of accumulating costs, or of depriving his adversary of the opportunity of correcting his error." There has been incorporated in our territorial statutes (Rev. Stats., par. 673) the following provision, which was contained in the original code of New York, and is to be found in nearly every code state: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." A provision in a contract which entitles the servant to three months' notice of the termination of his employment is in effect an agreement to continue the term of service for that length of period after the notice, and the employer cannot dismiss him

before the expiration of his full term without sufficient cause. When a servant is wrongfully discharged before the expiration of his term, he has his choice of two remedies: 1. He may treat the contract as continuing, and recover damages for the breach thereof; or 2. He may treat the contract as rescinded, and sue on a *quantum meruit* for services actually rendered. He cannot, however, as contended by counsel for plaintiff in error, maintain an action for his wages or salary, except for past services performed. In some of the early cases the fiction of a "constructive" service was resorted to, and a servant discharged without cause was allowed to recover wages; but this view has been discarded in the later decisions, and has been disapproved by text-writers. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Durkee v. Mott*, 8 Barb. 423; *Saxonia Reduction Co. v. Cook*, 7 Colo. 569, 4 Pac. 1111; Smith on Masters and Servants, 95. The defendant in error had been paid for his services, at the stipulated rate, up to the time of his dismissal. His action was therefore properly one in damages for breach of contract; and the complaint which has been quoted contains, as we view it, all the substantive and essential facts required to constitute a cause of action and to give jurisdiction. The merely formal defects we are debarred from considering.

The other assignments of error question the sufficiency of the evidence to sustain the judgment. The basis of the contract between these parties was the following letter written to Andrews by the company's superintendent: "Old Dominion Copper Mining and Smelting Company. Globe, Gila County, Arizona, Nov. 5th, 1896. Mr. Alexander Andrews, Tuckahoe, N. Y.—Dear Sir: Yours of October 29th at hand, and contents carefully noted. The knowledge that should go with the experience you describe should be valuable in meeting the demands that would be made upon you in the place you apply for. You have experience enough to know that every class of mechanical application has its conditions peculiar to its necessities. I will engage your services upon the following conditions: That, as I infer from past correspondence with him, the party to whom I write in this mail is unavailable, and of which I will know by telegraph in about seven days. That you can come within a few days of Nov. 1st, certainly before Dec. 1st. We will pay you \$200 per month;

no privileges, except what we may be prompted to give by our consideration and regard for efficient and faithful services. If you will come by Nov. 1st, about, we will pay your traveling expenses to this point. I am not enthusiastic, and have some misgivings that you will find considerable new to you in mining machinery and applications. You are well equipped to acquire such experience, but we may have to pay for some of it. You certainly can repair and look after the machines satisfactorily, but we shall be putting in considerable new machinery shortly, and the design and applications for the best economy and service will require all the knowledge of the best master mechanic I can get, with my own experience. The permanency of the position is good, and I will agree to give and require three months' notice, in case we should need it, to be waived by mutual consent in an emergency. In the course of a year, and our estimation of your ability, there is a possibility of better pay. Please telegraph me, our expense, upon receipt of this, whether or not you will come; and, as soon as I hear from the party mentioned (not later than the 14th), I will telegraph you the engagement of your services. Yours truly, S. A. PARNALL, Supt." It is admitted that this letter was written by the company's authorized agent. It was the only evidence offered on the trial to indicate the nature of the contract which existed. The proposition which it contained was accepted by Andrews, who entered into the company's service on or about December 6, 1896, and remained in its employ until July 26, 1897, when he was discharged without notice, and without having waived his right to notice. On the day following his dismissal, the defendant in error tendered his services to the company, but they were refused, and a subsequent offer by him was similarly treated. The testimony relating to alleged incompetency and neglect of duty on the part of the defendant in error was conflicting. The plaintiff in error was permitted to show, in mitigation of damages, what the defendant in error had been able to earn during the remainder of his term; and the court, following a well-sustained rule, determined the measure of damages by deducting the amount of these earnings from the sum stipulated to be paid by the contract. There was evidence in this case tending to prove every material fact necessary to be found to sustain the judgment of the district court

and it is not our province to weigh the evidence or decide upon its preponderance. We find no error, and the judgment is affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 652. Filed March 15, 1899.]

[56 Pac. 719.]

GEORGE BRAVIN, Relator and Appellant, v. THE
MAYOR AND COMMON COUNCIL OF THE CITY
OF TOMBSTONE, Respondents and Appellees.

1. LOAN COMMISSION—MANDAMUS—TO COMPEL CITY AUTHORITIES TO DEMAND FUNDING—ACT OF CONGRESS APPROVED JUNE 25, 1890, AND LAWS OF ARIZ. 1891, ACT No. 79, APPROVED MARCH 19, 1901, CONSTRUED—WHO MAY DEMAND FUNDING.—A complaint for a peremptory writ of *mandamus* to compel the mayor and common council of the city of Tombstone to report to the loan commissioners of the territory certain warrants held by the petitioner, and to demand of said loan commissioners that they fund said indebtedness, as provided by law, is subject to demurrer as, under the act of Congress approved June 25, 1890,—it is doubtful whether it is mandatory upon the authorities of any city, unless upon the written demand of the loan commissioners, to report the bonded and outstanding indebtedness not already funded.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Appellant.

James Reilly, and William Herring, for Appellees.

SLOAN, J.—The appellant applied in the court below for a peremptory writ of *mandamus* against the mayor and common council of the city of Tombstone to compel the latter to report to the loan commissioners of the territory certain indebtedness of said city, evidenced by certain warrants held

by him, and to demand of said loan commissioners that they redeem and fund said warrants by the issuing of bonds in exchange for the same, as provided by the provisions of the various funding acts of Congress and of the territory for the funding of the outstanding indebtedness of municipalities. In substance the complaint sets forth that during the years 1891, 1892, and 1893 various warrants were drawn by the auditor of the city of Tombstone upon the salary fund of said city for the payment of salaries due various officers of said city; that each of said warrants was duly presented to the city treasurer, and by this officer indorsed "Presented and not paid for want of funds"; that each of said warrants has been duly assigned by indorsement to the plaintiff, who is now the holder and owner thereof for value; that the legally constituted officers of the said city had full knowledge of the execution of said warrants, of their presentation to the treasurer, and of their assignment to the plaintiff, and that the money specified in said warrants was and is a lawful charge against the said city of Tombstone; that none of said warrants have been paid, and the same are now evidence of valid and legal indebtedness of said city, and are fundable under the provisions of the various funding acts of Congress and of the territory; that by said acts it is made the duty of the mayor and common council of said city to report to the loan commissioners of the territory the said indebtedness, and to make demand for the redemption and funding of the same; that he did, on the twenty-fourth day of December, 1896, in writing make demand upon the said mayor and common council that they report said indebtedness to said loan commissioners, and fund the same in accordance with the law; that, notwithstanding his said demand, the said mayor and common council have failed and refused, and still refuse, to take any steps looking to the funding of said indebtedness. The complaint was demurred to, and the demurrer sustained by the trial court. From the ruling sustaining the demurrer, and from the judgment dismissing the complaint, this appeal is taken.

Whether or not, as found by the trial court, the complaint be defective, in not alleging that demand had been made for the payment of the warrants, or any of them, and payment refused, and in not alleging that the city of Tombstone had

not funds with which to pay the same, we find it unnecessary to decide, for the reason that the complaint would be bad, even were these allegations properly pleaded. The act of Congress approved June 25, 1890, contained the provision that "the boards of supervisors of the counties, the municipal and school authorities are hereby authorized and directed to report to the loan commissioners of the territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and the said loan commissioners shall provide for the redeeming or funding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other territorial indebtedness," etc. It is doubtful, under this provision of the law, whether it is made the mandatory duty of the authorities of any city, unless upon the written demand of the loan commissioners, to report the bonded and outstanding indebtedness of such city. The language, "authorized and directed," might imply, in connection with the subsequent provision that the loan commissioners, "upon the official demand" of the municipal authorities, "shall provide for the redeeming or the funding" of the municipal indebtedness, that such was not the intent of the act. At any rate, the act of June 25, 1890, was utterly silent as to the right of the holder of any warrants or other outstanding indebtedness to compel either the municipal authorities or the loan commissioners to take any steps required for the funding of such indebtedness. It was doubtless for this reason that the territorial act of March 19, 1891, provided that "any person holding bonds, warrants or other evidence of indebtedness of the territory of any county, municipal or school district within the territory, . . . may exchange the same for the bonds issued under the provisions of this act," etc. As the law stood, therefore, after March 19, 1891, it was the duty of the loan commissioners to fund the outstanding indebtedness of municipalities—first, upon the official demand of municipal authorities; second, upon the application of the holders of such outstanding bonds, warrants, and other evidences of indebtedness as had not been funded. This was the view taken of these provisions of the

law by the supreme court of the United States in *Utter v. Franklin* (decided January 3, 1899, and not yet officially reported), 172 U. S. 416, 19 Sup. Ct. 183. It follows, therefore, that appellant, in applying for the writ of mandamus against the municipal authorities of the city of Tombstone, to compel the latter to report the outstanding indebtedness of the said city held by him, and to demand the funding of said indebtedness from said loan commissioners, has mistaken his remedy. The judgment of the court below is therefore affirmed.

Street, C. J., and Doan, J., concur.

[Civil No. 638. Filed March 15, 1899.]

[56 Pac. 728.]

THE WESTERN INVESTMENT BANKING COMPANY,
a Corporation, Plaintiff and Appellant, v. D. L. MUR-
RAY, Treasurer and Ex Officio Tax-Collector of Mari-
copa County, Territory of Arizona, Defendant and
Appellee.

1. STATUTORY CONSTRUCTION—LITERAL READING ABSURDITY—REFORMATION TO ARRIVE AT INTENT OF LAW—LAWS ARIZ. 1897, ACT No. 51, SEC. 4, REFORMED.—When adherence to the punctuation and wording of a statute results in manifest absurdity and inconsistency, evident mistakes, omissions, and the improper use of words may be remedied, and even the structure of sentences altered, in order to arrive at the purpose and intent of the law. Statute, *supra*, reformed.
2. CORPORATION—CAPITAL STOCK—SHARES OF STOCK—DEFINED.—Capital stock is the property of the corporation; shares of stock are the property of the individual holders thereof.
3. TAXES AND TAXATION—ASSESSMENT—SHARES OF BANK STOCK.—In an assessment which states the names of shareholders, and the correct number of shares owned by each, in a banking corporation, it is evident the intent was not to tax the capital stock, but the shares of stock owned by the individual stockholders.
4. SAME—SAME—SAME—ALL BANK STOCK ASSESSABLE IN NAME OF BANK MERE IRREGULARITY—LAWS ARIZ. 1897, ACT No. 51, SECS.

4, 6, CONSTRUED.—Section 4, *supra*, provides that the shares of national bank stock shall be entered and taxed in the names of shareholders; section 6, *supra*, provides that it is the duty of the officer in charge of any banking association to file a sworn statement showing the number and amount of shares of such corporation, the names and residences of the shareholders, and the number and amount of shares owned by each. It is the intent of the act, *supra*, that the shares of all banking associations, as well as national banks, should be listed and assessed in the names of the individual holders thereof, and, under the said statute making it the duty of the officers of the bank to pay the taxes due on such shares and giving the bank a lien to protect it in so doing, while properly shares of bank stock should be listed and assessed in the names of the holders, an assessment in the name of the bank is a mere irregularity, and one which will not warrant the equitable interference of the court.

5. BANKS AND BANKING—WHAT CONSTITUTES A BANK—WITHIN LAWS 1897, ACT NO. 51, SEC. 1.—A corporation engaged in the business of receiving money, investing it for its depositors by loaning it in their names, collecting rents, and interest due on such loans as it makes, which interest and rents are subject to check by those for whom collected; and which charges commission on its loans and also a commission on the collection of interest and rents, is a banking association within the meaning of the statute, *supra*.

6. TAXES AND TAXATION—BANKS—OTHER CORPORATIONS—HOW ASSESSED—DOUBLE TAXATION—LAWS ARIZ. 1897, ACT NO. 51, CONSTRUED AND HELD NOT TO REPEAL REV. STATS. ARIZ. 1887, PARS. 2630, 2633—NOR ARE THEY REPEALED BY LAWS ARIZ. 1893, ACT NO. 85—REV. STATS. U. S. 1878, SEC. 5219, CITED.—Act No. 51, *supra*, does not contemplate "double taxation," but provides that all corporations, including national banks, which otherwise would be exempt under section 5219, *supra*, shall bear their just burden of taxation; and, in order to effect this purpose, in the case of banks, the shares of stock shall be assessed and taxed, and not the corporate property, while in the case of other corporations the assessment shall be upon the corporate property, and not upon the shares of stock. Thus construed, the act, *supra*, is not in conflict with, neither does it nor Act No. 85, *supra*, repeal, paragraphs 2630 and 2633, *supra*.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

J. B. Woodward, for Appellant.

Thomas E. Flannigan, District Attorney, and Baker & Bennett, for Appellee.

There is a marked distinction between the position of the taxpayer who is proceeding at law, defending upon the ground of the irregularity of the tax, and one who goes into a court of equity seeking affirmative relief. In the former case the taxpayer may stand upon his legal rights and insist upon a more or less strict compliance with the requirements of the law; in the latter case he must bring himself within some recognized principle of equitable jurisdiction. *Bellevue Improvement Co. v. Bellevue*, 39 Neb. 876, 58 N. W. 447.

Courts of equity will not interfere to prevent the collection of taxes on the ground of irregularity or illegality in the proceeding, unless they are also inequitable, and to enforce payment thereof would be against conscience. *Spargur v. Romine*, 38 Neb. 736, 57 N. W. 523; *State Railroad Tax Cases*, 92 U. S. 575.

In order to invoke the aid of a court of equity to restrain the collection of a tax it must be shown that the tax is not imposed by the statute, or, if so imposed, that the statute is unconstitutional and void. In other words, the form, method, and procedure, however erroneously pursued, are not sufficient to invoke the powers of a court of equity. It must be shown that the substance of the tax itself has not been imposed by the legislature, or that there is no power in the legislature to impose it. *State Railroad Tax Cases*, 92 U. S. 575; *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 450.

Plaintiff contends that the capital of this company is principally invested in real estate, and that a tax upon such real estate and a tax upon the shares of stock is double taxation. The courts hold to the contrary. The burden of the one falls upon the corporate entity, and the burden of the other falls upon the several shareholders of the bank. This does not constitute double taxation. *Commonwealth v. Hillside Cemetery Co.*, 170 Pa. St. 227, 32 Atl. 404; *U. S. Electric Power and Light Co. v. State*, 79 Md. 63, 28 Atl. 768; *Porter v. Rock Island and St. Louis R. R. Co.*, 76 Ill. 561; *The Danville Lumber and Manufacturing Co. v. Parks*, 88 Ill. 463.

SLOAN, J.—The Western Investment Banking Company brought suit in the court below against D. L. Murray, as

treasurer and *ex officio* tax-collector of Maricopa County, to obtain an injunction against the collection of a portion of its taxes assessed for the year 1897. The bank was assessed for the said year upon its real estate and personal property, valued at \$7,045.10. There was also placed upon the assessment-roll for the same year, against the name of the bank, property described as: "Capital stock: J. Lutgerding, 1 share; P. L. Kay, 1 share; P. K. Hickey, 10 shares; S. P. Hoefler, 10 shares; M. J. Hickey, 150 shares,—value, \$9,125.00." The bank tendered to the said tax-collector the taxes due on its real estate and personal property, but refused to pay the taxes assessed upon the above-described property. The tax-collector refused to accept from the bank any amount of its taxes less than the whole amount charged against it, and in due season advertised the bank's property for sale for the whole amount of the bank's taxes, which had become delinquent; whereupon the bank brought this suit to restrain the sale. Judgment was entered by the court below denying to the appellant the relief prayed for, or any relief in the premises. From this judgment the bank has appealed.

A large number of assignments of error are set up in the brief of appellant, the more important of which we will consider without regard to the order in which they are set out in the brief. Concisely stated, these assignments are based upon the following propositions: First, that the assessment objected to is uncertain and insufficiently described, in that it does not appear therefrom whether the taxation of the capital stock, or the taxation of shares of stock, of the bank, is intended; second, that if the shares of stock owned by the stockholders of the bank are intended to be taxed, then the same are illegally assessed in the name of the bank; third, that the appellant is not of the class of corporations the shares of stock of which are subject to taxation; fourth, that the taxation of the real estate and personal property of the bank, and also of its shares of stock, is double taxation.

The questions here presented involve a construction of that exceedingly crude piece of legislation known as "Act No. 51 of the Laws of 1897." This act reads as follows:—

"An act to amend an act entitled 'An act relating to assessment and collection of taxes,' approved April 13, 1893.

"Be it enacted by the legislative assembly of the territory of Arizona:

"Section 1. That Act No. 85 of the legislative assembly, approved April 13, 1893, be amended so as to read as follows: That all shares of stock of every national bank, or banking association, whether organized under the laws of this territory, or of any other state or territory, or any act of Congress of the United States, and doing business in this territory shall be assessed and taxed in the county where such national bank, or banking association is located for the transaction of business; provided that nothing herein shall be so construed as to tax the shareholders of such national banks and banking associations, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

"Sec. 2. That all shares of stock of every corporation or association in this territory, other than incorporated banking associations that shall engage in the business of banking, in buying and selling exchange, and receiving deposits, shall be assessed and taxed in the county where such association or corporation is located and doing such business, provided, such shares shall not be at a greater rate than is assessed against other moneyed capital in the hands of individual citizens of the territory.

"Sec. 3. That every person, corporation or association, other than national banks, and corporations, and associations that do a banking business, on capital stock divided into, which is represented by shares, who shall engage in the business of banking, buying and selling exchange, and receiving deposits in this territory, on capital stock not represented by, or divided into shares, shall be taxed in the county where such person, corporation, or association is located and doing business, on the cash value of such capital stock to be estimated on the same basis of valuation as other moneyed capital in the hands of individual citizens.

"Sec. 4. The shares of national bank stock shall be entered and taxed in the name of the shareholders of the several shares thereof respectively engaged in the business of banking, and whose capital stock is not divided into or represented by shares, shall be entered and taxed in the name of such person, corporation or association.

"Sec. 5. Upon the demand of the assessor, the president, cashier or other officers in charge of an incorporated national bank association, shall make out and deliver to said assessor,

a sworn statement showing the number of shares of said national bank; the name and residence of each shareholder and the number and amount of shares owned by him. Every shareholder of said national bank shall, in the town or city where said national bank is located, render at their actual cash value to the assessor of taxes, all shares owned by him in such national bank; and in case of his failure to do so, the assessor shall list and assess such unrendered shares as other unrendered property. The taxes due upon the shares of banking corporations shall be a lien thereon, and shall be paid by the cashier or president of such national bank or banking institution and shall be a lien against and assessed to such shares of stock, and no banking corporation shall pay any dividends to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer on its books, of any shares, the owner of which is in default in the payment of his taxes on the same. That the taxes due on shares of national banks shall be a lien on the same, and no corporation or association shall permit any dividends to be paid to any holder of any such shares, or permit any transfer of the same on its books until the tax thereon shall have been paid.

"Sec. 6. That in the event any president, cashier or other officer in charge of any national bank or other corporation or association engaged in the business of banking in this territory, shall refuse, on the demand of the assessor, to file with said assessor, a sworn statement showing the number and amount of shares of said national bank, or association or corporation, the name and residence of each shareholder, and the number and amount owned by him, as demanded; the said assessor shall at once in the name of the territory, at his relation, institute proceedings in *mandamus*, to compel the statement to be so filed; and in the event of such failure in addition to the taxes due, the said officer, president or cashier, or managing agent so refusing shall forfeit an amount equal to double the amount of said taxes, to be recovered by the county in a civil action as for debt, and go into the school fund of such county where such national bank or association is located; said action to be brought by and in the name of said county.

"Sec. 7. That this act shall take effect," etc.

A cursory reading of the act will disclose bad punctuation, many omissions, and contradictory provisions. Particularly is this true of section 4 of the act. If we adhere strictly to the punctuation and wording of this section, the result is manifest absurdity and inconsistency. It is a settled rule of construction of statutes that where such a result follows a strict adherence to punctuation and the arrangement of words, phrases, and sentences, evident mistakes, omissions, and the improper use of words may be remedied, and even the structure of sentences altered, in order to arrive at the purpose and intent of the law. In section 4 there is evidently an omission between the words "respectively" and "engaged." An analysis of this section and of the preceding one will make it reasonably certain that the omitted words are, "and the capital stock of every person, corporation or association." By inserting a comma after the word "respectively," and adding thereafter the omitted words above given, the section will then read: "The shares of national bank stock shall be entered and taxed in the name of the shareholders of the several shares thereof respectively, and the capital stock of every person, corporation or association engaged in the business of banking, and whose capital stock is not divided into or represented by shares, shall be entered and taxed in the name of such person, corporation or association."

1. Was the assessment in question one upon the capital stock, or one upon the shares of stock, of the bank? There is a clear distinction between capital stock, as that term is used in its precise sense, and the shares of stock of a corporation. The former is the property of the corporation, and the latter is the property of the individual holders of such shares. Inasmuch as the names of the shareholders, and the correct number of shares owned by each, in the Western Investment Banking Company, were stated in the assessment, it is quite evident that the intent was, not to tax the capital stock of the bank, but the shares of stock owned by the individual stockholders.

2. Were these shares of stock incorrectly listed and assessed in the name of the bank? As we have seen, the correct reading of section 4 is "that the shares of national bank stock shall be entered and taxed in the name of the shareholders of the several shares thereof respectively." No reference is

here made to other than the shares of national bank stock. By the provisions of section 6, however, it is made the duty of the officer in charge of any banking association, upon the demand of the assessor, to file with this officer a sworn statement showing the number and amount of shares of such corporation, the names and residences of the shareholders, and the number and amount of shares owned by each. If the purpose of the act was to provide that only the shares of national bank stock should be entered and taxed in the names of the holders thereof, then the provision in section 6 would be without reason or purpose. We think, therefore, the intent of the act was to provide that the shares, not only of national banks, but also of other corporations or associations engaged in the business of banking in this territory, should be listed and assessed in the names of the individual holders thereof. Other provisions of the act, however, make it the duty of the cashier or president of all banks to pay the taxes due upon the shares of stock, and protect such officer in such payment by creating a lien against such shares of stock, and in prohibiting such banks to pay any dividends to any shareholder who is in default in payment of taxes due on his shares, and in prohibiting such banks from transferring on the books any shares the owner or owners of which may be in default in the payment of the taxes due on the same. While, properly, shares of stock in a banking institution should be listed and assessed in the names of the holders thereof, the act, whether or not it makes it the mandatory duty of the officer in charge to pay the taxes, at any rate authorizes and permits such payment by such officer, and protects him in so doing. The relation of agency is thus created, and it therefore makes little or no difference whether the shareholders in the first instance pay the taxes, or whether the managing officer of the corporation pays the taxes due on the shares. At best, the assessment, therefore, on the shares of stock in the name of the bank, is a mere irregularity, and one which will not warrant the equitable interference of the court. It has been repeatedly held that where the objection is to the mere mode of taxation, and does not go to the justness of the tax itself, equity will afford no relief. *State Railroad Tax Cases*, 92 U. S. 575; *Cooley on Taxation*, p. 336.

3. It is claimed by the appellant that it is not a banking

institution, within the meaning of section 1 of the act. The Western Investment Banking Company is a corporation organized under the General Incorporation Act of the territory, and, as appears from the statement of its cashier, is engaged in the business of receiving money, and investing it for its depositors, by loaning it in their names, and also of collecting rents, and interest due on such loans as the bank may make. The interest and rents thus collected are subject to check by those for whom they are collected. The bank charges a commission on its loans to the borrowers, and also a commission on the collection of interest and rents made by it. The record does not disclose whether, under its articles of incorporation, the bank is thus restricted in its business or not; but, assuming that under its articles it has no power to engage in any other than its present business as described by its cashier, does it properly belong to the category of banking associations? In *Warren v. Shook*, 91 U. S. 704, Mr. Justice Hunt, speaking for the court, said: "Having a place of business where deposits are received, and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker." Again, in *Oulton v. Institution*, 17 Wall. 109, the following definition is given of a bank: "Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping, until the depositor should see fit to draw it out for use. But the business, in the progress of events, was extended; and bankers assumed to discount bills and notes, and to loan money on mortgage, bond, or other security, and at a still later period to issue notes of their own, intended as a circulating currency and as medium of exchange, instead of gold and silver. Modern bankers frequently exercise any two, or even all three, of those functions; but it is still true that an institution prohibited from exercising any more than one of those functions is a bank, in the strictest commercial sense." We think, under these definitions, the Western Investment Banking Company is now engaged in the business of banking, and, as its name indicates, is a banking association, within the meaning of section 1 of said act No. 51, and that its shares of stock are therefore taxable.

4. Was the taxation of the bank's real estate and personal property, and also of its shares of stock, illegal because in conflict with paragraph 2630 of the Revised Statutes, which declares that nothing in the revenue act shall be construed to require or permit double taxation, or in conflict with paragraph 2633, which reads: "Shares of stock in a corporation possess no intrinsic value over and above the actual value of the property of the corporation for which they stand and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." Is act No. 51, given above, to be construed as repealing the provisions of these sections in so far as they pertain to the assessment of shares of stock of banks and banking institutions? The principle which underlies paragraph 2633 is that the taxation of shares of stock in a corporation, and also of the corporate property, is in effect taxation of the same property. Whether, as an abstract proposition, this be sound or not, we are not concerned, inasmuch as it is the expression of the legislative will. It follows, then, that it is immaterial, so far as the principle is concerned, whether the taxation be upon the property of a corporation or upon the shares of stock. Under the method pointed out for the taxation of corporate property in paragraph 2633, national banks, under the provisions of section 5219 of the Revised Statutes of the United States, escaped taxation upon all of their corporate property, including shares of stock, except such real estate as such banks might hold. It is doubtless for this reason that the legislature passed the act approved April 13, 1893, of which act No. 51 of the Laws of 1897 is an amendment. It is hardly conceivable that the legislature, even if it were assumed that it had the power so to do, would provide for what it has termed "double taxation" in the case of banks and banking institutions, while relieving all other corporations within the territory from this burden. A just and reasonable construction put upon act No. 51 is that it is therein intended that all corporations within the territory, including national banks, which otherwise would be exempt, shall bear their just burden of taxation; and, in order to effect this purpose

in the case of banks, the shares of stock shall be assessed and taxed, and not the corporate property, while in the case of other corporations within the territory the assessment shall be upon the corporate property, and not upon the shares of stock. By thus construing the act, consistency is given it, and it is made harmonious with the clearly expressed policy of the revenue laws as contained in paragraphs 2630 and 2633 of the Revised Statutes, which neither by direct reference nor by necessary implication are repealed, so far as the underlying principle is concerned, by either the act approved April 13, 1893, or by act No. 51 of the Laws of 1897.

The theory of the appellant is altogether at variance with the conclusion we have reached as to the construction to be given to act No. 51. Relief was not sought against the enforcement of the assessment upon the bank's property, but was sought against the enforcement of the assessment and the levy of taxes against the shares of stock of the bank; and as we have held that the latter tax is valid, and there is no such irregularity in the mode and manner of the taxation as to warrant equitable relief, the judgment of the court below must be affirmed.

Doan, J., and Davis, J., concur.

[Civil No. 661. Filed March 15, 1899.]

[56 Pac. 735.]

JAMES D. MONIHON, Defendant and Appellant, v. E. S. WAKELIN, Plaintiff and Appellee.

1. LANDLORD AND TENANT—COVENANT TO RENEW—SPECIFIC PERFORMANCE—APPEAL AND ERROR—FINDINGS—SUFFICIENCY OF EVIDENCE.—In an action for specific performance of a covenant to renew a lease, a finding that the lessor had made no contract for the letting of the premises to any other person, and was in the same position respecting said premises and the leasing thereof as on the day the option to renew expired, is sustained by evidence that while it was probable the lessor could have rented to a third party at an enhanced figure, yet he had not entered into any binding agreement so to do.

2. **SAME—SAME—SAME—FAILURE TO GIVE NOTICE—UNAVOIDABLE ACCIDENT WITHOUT INJURY TO LESSOR.**—A court of equity will decree specific performance of renewal in a lease, where the lessee, by reason of unavoidable accident, causing disability, failed to give notice of his intention to renew within the time specified in the lease for the giving of such notice, he having actually given such notice at the first opportunity, and where it appears that the lessor, by reason of the delay in giving notice, is not put in a worse position than he would have been had notice been given.
3. **SAME—SAME—CONSIDERATION—SUBSTANTIAL PART OF CONTRACT.**—A covenant to renew a lease is more than a naked option or a unilateral agreement, and, unless it is otherwise declared in the instrument itself, constitutes a substantial part of the whole contract, because it may well be considered as a material inducement which led to its execution.
4. **SAME—SAME—TIME THE ESSENCE OF.**—Time is of the essence of covenants of renewal in written leases, where the giving of notice of intention within a specified time is made condition precedent to such renewal.
5. **CONTRACTS—TIME ESSENCE OF—REASONABLE TIME—DISTINCTION.**—The distinction between a contract in which time is of the essence and a contract in which time is not made of the essence is, that strict performance is required of the terms of the former within the time specified, where such performance is possible, and the latter is regarded only as requiring that its terms be performed within a reasonable time.
6. **SAME—SAME—SPECIFIC PERFORMANCE—FAILURE TO PERFORM—CAUSED BY OTHER PARTY—ACCIDENT—DUE DILIGENCE—WITHOUT INJURY TO OTHER PARTY—INJURY—TEST.**—Where it appears that by act of the other party, or by unavoidable accident, such as could not be foreseen and guarded against, the performance of a contract of which time is of the essence even with the exercise of due diligence was rendered impossible, and the party at the earliest opportunity performed his part of the contract, the court will enforce it, provided the parties be left in the same relative position they would have been in had not delay occurred in the performance of the contract according to its terms. In determining whether the contract can under such circumstances be enforced without injury, the test is not that the one party may be able to profit by the failure of the other, but rather that he does not lose an advantage which he would have had had no failure occurred.
7. **LANDLORD AND TENANT—COVENANT TO RENEW—FAILURE TO GIVE NOTICE—WANT OF GOOD FAITH—DILIGENCE.**—Want of good faith or diligence can not be predicated upon the fact that the lessee did not give notice of his intention to renew a lease prior to an accident which prevented the giving of notice until after the time limited in the lease had expired, where it appears that the lessor

lived in the same town as the lessee and two days remained within which to serve the notice at the time the accident occurred.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, Thomas D. Bennett, and Joseph Campbell, for Appellant.

The specific performance of a contract in equity is not a matter of right in the party, but a matter of sound discretion in the court, which may grant or deny relief, as may appear equitable under all the facts and circumstances. Beach on Modern Equity Jurisdiction, sec. 566.

The right to a renewal is a mere option. It is not a mutual covenant. The test of mutuality is this: Could Monihon on the first day of May, 1898, have compelled Wakelin to take a new lease for a further term of five years. There is not one sentence in the lease that binds Wakelin to take a renewal. If Monihon had gone into court to compel Wakelin to specifically perform the contract, he would have been unable to frame a complaint that would state a cause of action. As the covenant itself terms it, it is a "privilege," an option, to be taken advantage of by Wakelin if he so desired. It binds Monihon if the terms thereof are complied with by Wakelin, but nowhere in the lease is there a corresponding covenant compelling Wakelin to accept a renewal. The covenant is therefore unilateral. *Bruce v. First National Bank*, 70 N. Y. 154, 35 Am. Rep. 505; *Swank v. Railroad*, 72 Minn. 380, 75 N. W. 594.

Time was of the essence in this contract. "If the parties have expressly treated time as of the essence of the contract, or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, courts of equity will not lend their aid to enforce specifically the agreement regardless of the limitation of time." *Coleman v. Appelgarth*, 66 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284.

"Where a contract is in anywise unilateral, as, for instance, in the case of an option to purchase, or a right of renewal, or of any other condition in favor of one party and not of

the other, then any delay in the party in whose favor the contract is binding is looked at with special strictness. . . . In such cases a court of equity will hold that in consequence of one party being bound and yet unable to enforce the unilateral contract against the other, who is free, the parties do not stand on an equal footing, and that, in consideration of these things, time must be deemed of the essence of the contract, and that when the time given by the memorandum expires without performance on the part of the option-holder the right of such holder is *ipso facto* gone." *Hollman v. Conlon*, 143 Mo. 369, 45 S. W. 275.

"But where the contract imposes no obligation upon him, leaves it optional with him to do a certain thing at a certain time, in such a case time is of the essence of the contract, in the broadest sense of the rule, and the failure of the party to comply with its terms deprives him of the right to demand the enforcement of the contract." *Stembridge v. Stembridge*, 87 Ky. 91, 7 S. W. 613. See, also, *Carter v. Phillips*, 144 Mass. 102, 10 N. E. 500; *Mason v. Payne*, 47 Mo. 518.

It is immaterial how sick Wakelin was or how seriously he was injured. He comes into court with bad grace, crying of his injuries, and because of them asks to be forgiven for violating his contract, for the reason that he had four years and six months almost before the day of his accident in which to give this notice to Monihon. He had a long period in which to give this notice. If he chose to postpone it and run the chances up to the last minute, he, and not Monihon, should suffer for his hazard. He should endure the results of his own negligence. *Mason v. Weirengo*, 113 Mich. 151, 67 Am. St. Rep. 461, 71 N. W. 489; *Herter v. Mullen*, 9 App. Div. 593, 41 N. Y. Supp. 708; *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, 31 N. E. 94.

Baker & Bennett, for Appellee.

It is a well-established principle of equity jurisprudence that time is not of the essence of the contract unless made so by the parties. But it is contended that this contract does not fall within this rule, because it is an optional or unilateral contract; that such contracts are not favored in equity; and that the party having the option must strictly perform his part of the contract before he is entitled to the benefit of the

option. It may be admitted, for the sake of the argument, that contracts purely optional or unilateral are looked upon, both at law and in equity, differently from those contracts which are mutual. That the parties claiming the benefit of the contract, and asking for its enforcement in a court of equity, will be held to a stricter performance on his part than on the case of contracts that are mutual and are equally binding on both parties. But the error into which counsel have fallen is in classing the contract now in consideration as a unilateral or one-sided contract. In the case of *House v. Jackson*, the supreme court of Oregon says: "It is now well settled that an optional agreement to convey or renew a lease without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it." *House v. Jackson*, 24 Or. 89, 32 Pac. 1027. To the same effect, see *Schroeder v. Gemeinder*, 10 Nev. 355; *Stansbury v. Fringer*, 11 Gill & J. (Md.) 152; *Souffrain v. McDonald*, 27 Ind. 269; *Cooper v. Pence*, 21 Cal. 404; *Hall v. Center*, 40 Cal. 63; *Waters v. Bew*, 52 N. J. Eq. 787, 29 Atl. 590.

It will be seen, therefore, that an optional provision in a mutual contract is not within the principle applied by courts of equity to contracts wholly optional in their character, and that when the optional clause forms part of a lease or other contract the whole contract will be treated in equity as a mutual contract, and the general equitable doctrine that time is not of the essence of the contract unless specifically made so by the parties will be applied to the whole contract.

The case of *New York Life Ins. Co. v. Reston* was an action for the specific performance of a covenant to renew, contained in a lease, provided lessee gave notice of his intention to renew prior to certain date. The notice was not given until thirty-five days after the date specified in the lease. The excuse given was, that the lessee had honestly been mistaken as to the time the notice should have been given, but no fraud or fault on the part of the lessor was charged. When the notice was given the lessee was informed that the time had expired and no renewal would be made. In the decision of this case the court says: "In the absence of any express intention

on his part, it cannot reasonably be presumed that the plaintiff would knowingly surrender so valuable an interest as he had in that lease without adequate compensation. Neither should its honest mistake of a fact, under all the circumstances, be regarded as laches. . . . Time was not originally of the essence of the contract. It was not ingrafted into it by subsequent notice, and the delay on plaintiff's part in expressing his option was not so great as to constitute laches. I cannot assent to the proposition that there was no mutuality in the covenant to renew." The court decreed a renewal of the lease as prayed for. *New York Life Ins. Co. v. Reston*, 10 Abb. 50. To the same effect are *Reed v. St. John*, 2 Daly, 213; *Banks v. Haskell*, U. S. Dig. 1877, 493; *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593; *Selden v. Camp*, 95 Va. 527, 28 S. E. 877.

SLOAN, J.—The appellant, James D. Monihon, is the owner of a building in the city of Phenix known as the "Monihon Block." On the first day of May, 1893, Monihon leased to J. A. Kurtz and E. S. Wakelin the corner storeroom in said building for the term of five years, at the rental of one hundred dollars per month. The lease was in writing, and contained the following provision: "The lessees by giving lessor six months' written notice, shall have privilege to renew this lease at end of term for same purposes, and rate of rent and manner of payment, as above." This lease was, during the term, assigned to Wakelin & Co., a firm composed of E. S. Wakelin and Amanda Kurtz. Subsequently, Amanda Kurtz withdrew from the firm, and Wakelin continued in possession of the leased premises, and paid the rent as it became due. The original term of the lease expired May 1, 1898. On October 28, 1897,—two days before the expiration of the time within which, by the terms of the lease, the lessees might exercise their option of renewal,—Wakelin was thrown from his horse, and so severely injured that he was taken to the hospital, where he remained physically and mentally incapacitated for business until November 22, 1897. On this day he was taken by his physician to his store, where he wrote out a notice of his intention to claim a renewal of the lease, and had this notice served upon Monihon. In the meanwhile Monihon had entered into negotiations with one Keifer for

the renting of his storeroom at one hundred and forty dollars per month, but no binding agreement had been entered into for the renting of the storeroom to Keifer prior to service of the notice of Wakelin's intention to renew. Monihon refused to renew the lease to Wakelin at the expiration of the term, claiming that the latter had forfeited his right of renewal because of his failure to give notice of his intention within the time specified in the lease, whereupon Wakelin brought this suit to compel Monihon to specifically perform the covenant of renewal, and execute a new lease. A decree was entered by the court below in favor of Wakelin, as prayed for in the complaint.

The findings of the court upon what we consider the central and controlling facts in the case were as follows: "That the court further finds that on October 28, 1897, more than six months before the expiration of said lease, plaintiff had elected and determined to exercise his option to renew said lease, and had then determined and intended to give the defendant notice in writing of such intention and determination six months prior to the expiration of the term of said lease, but because of an accident that happened to plaintiff without his fault, and which he could not prevent, the plaintiff was so injured as to render him physically and mentally incapacitated from giving such notice at any time between the said 28th day of October, 1897, and on the 22d day of November, 1897, the plaintiff did give the defendant written notice of his election and determination to demand renewal of said lease for the term of five years from its expiration; and the court further finds that at the time said notice was given, on November 22, 1897, the defendant, J. D. Monihon, had made no contract for the letting of said premises to any other person, and was in the same position respecting said premises, and the use or leasing thereof, as on November 1, 1897." Appellant attacks these findings of the court, and particularly the one that on November 22d, when the notice was given by Wakelin of his intention to renew, Monihon had made no contract for the letting of the premises to any other person, and was in the same position respecting the premises and its leasing as on November 1, 1897, when, by the strict letter of the contract, Wakelin's option to renew expired. An examination of the testimony upon this point

discloses that while it is very probable that Monihon could have rented the premises to Keifer at the expiration of the lease for one hundred and forty dollars per month, yet it was not shown that he had entered into any binding agreement of lease with Keifer or any one else; and hence the finding is supported by the evidence. The question, therefore, becomes one of law, which may be stated thus: Will a court of equity decree specific performance of a contract of renewal in a lease, where the lessee, by reason of unavoidable accident causing his disability, failed to give notice of his intention to renew within the time specified in the lease for the giving of such notice, and the notice is actually given at the first opportunity offered the lessee, and where it appears that the lessor, by reason of the delay in giving notice, is not put in a worse position than he would have been in had the notice been given in time? It is contended by counsel for appellant that the covenant to renew the lease was nothing more than a naked option—a unilateral agreement. If this contention be sound, it has an important bearing upon the question under consideration. An option to purchase, or to renew a lease, standing alone, unsupported by any consideration which has passed, both in law and equity is regarded differently from a covenant to convey, or to renew a lease forming an integral part of a contract or lease, containing several distinct covenants, and founded upon an adequate consideration. The latter is treated as more than a mere privilege, and as having all of the elements of a mutual contract. *Hall v. Center*, 40 Cal. 63; *Souffrain v. McDonald*, 27 Ind. 269; *House v. Jackson*, 24 Or. 89, 32 Pac. 1027. Such covenant to convey or to renew a lease, unless it be otherwise declared in the instrument itself, is properly held to constitute a substantial part of the whole contract, because it might well be considered as a material inducement which led to its execution. In the case at bar this is illustrated by the testimony of Wakelin. In effect, he testified that, had no covenant to renew been inserted in the written lease, he would not have agreed to it, for the reason that the premises at the time had a prospective value as a place of business greater than it then possessed, and he therefore agreed to pay the stipulated rent for the term, because of the privilege of leasing the premises for a further term when the premises, through the growth of the town and the exten-

sion of trade, should be made more valuable to him as a business stand. We view the covenant to renew in the lease as a mutual contract, founded upon an adequate consideration, and will therefore give attention to the law applicable to contracts of renewal, rather than to mere options to renew.

It is contended that time is of the essence of such a contract of renewal, and that, therefore, equity cannot, without making a new contract between the parties, relieve against its forfeiture, even if occasioned solely by unavoidable accident, and may not decree specific performance of such contract under such circumstances. That time is of the essence of such a contract is doubtless true. Covenants of renewal in written leases, where the giving of notice of intention within a specified time is made a condition precedent to such renewal, are generally so understood and treated by the parties themselves, and so regarded by the courts. The reason why they are so regarded is that a failure to give notice might result in serious loss and inconvenience to a lessor, and, when such a result is apt to follow a failure to comply with the terms of a contract calling for the performance of any act within a particular time, time is then regarded as of the essence of such contract. It is therefore required of a party to such a contract that he keep his contract with literal strictness, or suffer the consequences of his failure. The distinction between a contract in which time is of the essence and a contract in which time is not made of the essence is that strict performance is required of the terms of the former within the time specified, where such performance is possible, and the latter is regarded only as requiring that its terms be performed within a reasonable time. While the law so regards and treats a contract in which time is of the essence, it is not true that a court of equity will refuse in every instance to specifically enforce a contract in which time is of the essence, and where its terms in this respect were not literally complied with; nor is it strictly true that in so doing a new contract is made between the parties. It is rather true that a court of equity, in relieving against the consequences of unavoidable failure to perform the contract within the time specified, does so upon the theory that it is enforcing the contract in the true intent and meaning of the parties; for it will not be regarded that anything more is intended by such a contract than that

there should be perfect good faith and utmost diligence to perform its terms within the time specified. Anything short of the utmost good faith and diligence on the part of the party seeking to be relieved from the consequences of a failure to conform strictly to the terms of such contract will not be regarded as sufficient; but where it appears that by the act of the other party, or by unavoidable accident of such character as could not be foreseen and guarded against, the performance of the contract with the exercise of due diligence was rendered impossible, and the party at the earliest opportunity performed his part of the contract, the court will enforce it, provided this can be done, and the parties be left in the same relative position they would have been in had no delay occurred in the performance of the contract according to its terms. In determining whether the contract can, under such circumstances, be enforced without injury, the test is not that the one party may be able to profit by the failure of the other, but rather that he does not lose an advantage which he would have had had no failure occurred.

Applying these principles to the case at bar, the court found that the giving of notice by Wakelin within the time specified in the contract was rendered impossible by reason of his accident and misfortune, that he availed himself of the earliest opportunity to give the notice which his situation permitted, and that Monihon did not suffer loss by reason of the delay. It is such a case as warranted a court of equity in enforcing the contract, notwithstanding the failure of Wakelin to comply literally with the terms of the covenant of renewal. Want of good faith or diligence could not be predicated upon the fact that Wakelin did not give notice prior to his accident, for to do so would be to inflict a penalty upon him for availing himself of a right given him by the contract. Had Wakelin waited until the last moment, and then was prevented by accident from giving notice, his conduct might then have properly been characterized as culpable negligence. But the fact was that Wakelin had two whole days within which to serve the notice upon Monihon, who, as it appears, was at the time in Phoenix; and hence, in the ordinary course of things, there was ample time remaining within which he could have been reached and served with notice. We conclude therefore, under the findings, that no equitable principle was violated by

the trial court in decreeing specific performance of the covenant to renew the lease in question, and the judgment is accordingly affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 646. Filed March 15, 1899.]

[56 Pac. 876.]

ANDREW CRONLY, on behalf of himself and all other taxpayers of the City of Tucson, Plaintiffs and Appellants, v. **CITY OF TUCSON et al.**, Defendants and Appellees.

1. **ELECTIONS—QUALIFICATION OF VOTER—REV. STATS. U. S. 1878, SEC. 1860 (ORGANIC ACT), CONSTRUED—POWER OF LEGISLATURE—WOMAN'S SUFFRAGE.**—Subject to the restrictions of section 1860, *supra*, that the right to vote should be limited to citizens of the United States, or to those who have declared their intention to become such, above the age of twenty-one years, the legislature of this territory has the power to confer the elective franchise upon females.
2. **SAME—SAME—LAWS ARIZ. 1897, ACT NO. 76, SEC. 2, VOID AS IN CONFLICT WITH REV. STATS. U. S. 1878, SEC. 1860 (ORGANIC ACT).**—The statute, *supra*, by its terms conferring the right to vote at municipal elections upon all taxpayers, male and female, without regard to age or citizenship, is in conflict with section 1860, *supra*, and is void.
3. **SAME—SAME—SAME—VOID FOR AMBIGUITY AND UNCERTAINTY.**—The statute, *supra*, providing that "every taxpayer shall be entitled to vote" at any city election, may mean every resident taxpayer, or every taxpayer without regard to residence within the city; again, the language used may convey the meaning that the taxpayer must be one paying taxes within the city, or it may be read to include a taxpayer whose taxable property is without the limits of the city; and such is the uncertainty and ambiguity in the language used that it is void.
4. **STATUTORY CONSTRUCTION—CONSTITUTIONAL LAW—AMBIGUITY—UNCERTAINTY.**—In construing statutes in part unconstitutional, the rule is, that whenever, after striking out unconstitutional portions, that which remains is so ambiguous in its meaning that the legislative intent cannot be with reasonable certainty ascertained, the whole act must fall.

5. SAME—ELECTIONS—MUNICIPAL BONDS—ACT OF CONGRESS OF MARCH 4, 1898, CONSTRUED—TWO THIRDS OF QUALIFIED VOTERS INTERPRETED.—In the statute, *supra*, providing for the issuance of bonds for municipal purposes when authorized by the affirmative vote of two thirds of the qualified voters, cast at an election to be held as therein specified, the proper construction of the term "two thirds of the qualified voters" is not two thirds of those qualified to vote, but two thirds of those qualified and actually voting.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

S. M. Franklin, for Appellants.

C. W. Wright, for Appellees.

SLOAN, J.—Appellant, Andrew Cronly, on behalf of himself and other taxpayers of the city of Tucson similarly situated, brought suit in the court below against the mayor and common council of the city of Tucson to restrain the latter from issuing bonds of the city for the purpose of constructing a water and sewerage system. By the provisions of the act of Congress of March 4, 1898, any city in any of the territories having a *bona fide* population of not less than one thousand persons, is authorized to issue bonds "for sanitary and health purposes, the construction of sewers, waterworks and the improvement of streets." It was provided in the act that before the issuance of such bonds "the mayor and common council of said chartered municipal corporation shall cause an election to be held in such city or town, and the mayor and common council of such municipal corporation shall cause to be published in a newspaper of general circulation, published in such city or town, a notice of the time and place or places of holding such election. Such notice shall be given at least thirty days before such election. On the question of the issuance of said bonds, no person shall be qualified to vote except he be in all respects a qualified elector and owner of real or personal property subject to taxation within the municipality. In case two thirds of the qualified voters, as above described, shall vote affirmatively for the issuance of

said bonds, then the mayor and common council shall issue the same, and not otherwise." In pursuance of said act, on May 5, 1898, an election was held in the city of Tucson for the purpose of determining the question whether or not bonds to the amount of one hundred thousand dollars for the purpose of constructing sewers and waterworks for said city should be issued. At this election more than two thirds of the votes cast were in favor of the issuance of the bonds. The complaint attacks the validity of this election upon the ground that female taxpayers qualified to vote at said election were by the election officers denied the right, and prevented from voting, and that there were sufficient of these to have changed the result of the election, had they been permitted to exercise their right to vote thereat. It was also charged in the complaint, as an additional ground for enjoining the issuing of bonds, that there were in the city of Tucson at the time of the election over eight hundred electors qualified to vote on the question submitted; that of these but two hundred and thirty actually voted, one hundred and ninety-six having voted for, and twenty-eight against, the issuing of said bonds, and six having cast blank ballots; that, therefore, "two thirds of the qualified voters" did not vote affirmatively for the issuance of the bonds. The complaint was held bad on demurrer, the trial court finding that neither of the grounds stated in the complaint constituted a valid objection to the issuance of said bonds. It was contended by appellant that the trial court erred in sustaining the demurrer, and that upon both of the alleged grounds the court should have held the bond election void.

Upon the first point, appellant relied upon the second section of act No. 76 of the Laws of 1897, as conferring upon female taxpayers the right to vote at all municipal elections. Said section reads as follows: "At any city election every taxpayer shall be entitled to vote without distinction of sex, but nothing herein shall be considered as abridging the right of elective franchises possessed by any person." The limitation prescribed by the organic law upon the power of the legislature to grant the elective franchise is found in section 1860 of the Revised Statutes of the United States. This section, in so far as it applies to the subject we are now considering, reads as follows: "At all subsequent elections in any territory here-

after organized by Congress, as well as other elections in territories already organized, the qualifications of voters and of holding office shall be such as may be prescribed by the legislative assembly of each territory, subject nevertheless to the following restrictions on the power of the legislative assembly, namely: First. The right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years and by those above that age who have declared, on oath before a competent court of record, their intention to become such, and have taken an oath to support the constitution and government of the United States." The supreme court of the United States, in *Minor v. Happersett*, 21 Wall. 162, has held that the word "citizen," as used in the constitution and laws of the United States, has uniformly conveyed the idea of membership of a nation, and nothing more, and hence includes either sex alike. The limitation placed by the first subdivision of said section 1860 being expressed by the term "citizens of the United States," it is clearly, then, within the power of the legislature to confer the elective franchise upon females over the age of twenty-one years, and who are citizens, either by birth or naturalization. The act of the legislature above referred to, however, by its terms attempts to confer the right to vote at municipal elections upon all taxpayers, male and female, without regard to age or citizenship, and therefore clearly transcends the power of the legislature as limited by the organic law. Even were the act not objectionable in this regard, it is doubtful if effect could be given it, because of its ambiguity and uncertainty. The language "every taxpayer shall be entitled to vote" may mean every resident taxpayer, or every taxpayer, without regard to residence within the city. Again, the language used may convey the meaning that the taxpayer must be one paying taxes within the city, or it may be read to include a taxpayer whose taxable property is without the limits of the city, and who therefore pays no city taxes. So, therefore, if, under any rule of statutory construction, we could give effect to section 2 of said act No. 76 of the Laws of 1897, to the extent that it does not violate the organic act above referred to with respect to age and citizenship, yet in doing this such is the uncertainty and ambiguity in the language used that we could not be certain that the legislative intent

was being thus carried out in its entirety. In construing statutes in part unconstitutional, the rule is, that whenever, after striking out unconstitutional portions, that which remains is so ambiguous in its meaning that the legislative intent cannot be with reasonable certainty ascertained, the whole act must fall. We therefore hold said section 2 of said act No. 76 of the Laws of 1897, in its entirety, to be inoperative and void. This disposes of the first question presented.

The question whether at the election the issuance of the bonds was assented to by a sufficient number of voters to authorize the issuance of the bonds under the requirements of the congressional act referred to turns upon the construction of the term "two thirds of the qualified voters as above described," as this language was used in said act. There is a clear distinction between an elector and a voter. The former is one who legally has the right to vote, and the latter is one who not only possesses the right, but who does actually vote. *Sanford v. Prentice*, 28 Wis. 362. In *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, the supreme court, in construing the term "qualified voters" as used in the Mississippi constitution, said that these words "must be taken to mean, not those qualified and entitled to vote, but those qualified and actually voting. In that connection, a voter is one who votes, not one who, although qualified to vote, does not vote." That Congress recognized in the act distinction between the words "elector" and "voter" we think is apparent from the fact that in the preceding sentence to the one containing the phrase under consideration the former word is used in its precise sense. It is contended by counsel for appellant that the phrase "as above described" enlarges the meaning of the words "two thirds of the qualified voters" so as to give them the meaning of two thirds of those qualified to vote. We think a simpler and more grammatical method of arriving at the meaning of the phrase would be to transpose the word "qualified" so as to make the sentence read, "In case two thirds of the voters, qualified as above described, vote affirmatively," etc. In this way we do no violence to the structural arrangement of the words, and yet adhere to the exact meaning of the language used. Applying this construction of the congressional act to the facts as stated in the complaint, and we find that the issuance of the bonds in question was au-

thorized by the affirmative votes of more than "two thirds of the qualified voters, as above described," of the city of Tucson. We find no error in the ruling of the court upon the demurrer, and the judgment is therefore affirmed.

Street, C. J., and Doan, J., concur.

[Criminal No. 132. Filed March 15, 1899.]

[56 Pac. 738.]

WILLIAM B. FOSTER, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. **CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.**—An instruction that a doubt, to authorize an acquittal, must be a reasonable one, and it must arise from a careful and candid investigation of all the evidence in the case, and unless the doubt is a reasonable one and does so arise, it will not be sufficient in law to authorize a verdict of not guilty, while not entirely free from criticism, is sufficient.
2. **SAME—MURDER—TRIAL—INSTRUCTIONS—BURDEN OF PROOF—MITIGATING CIRCUMSTANCES—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1655, CITED.**—A charge that if the jury find from the evidence that the defendant fired the fatal shot, then the burden of proving the circumstances of mitigation, or that justify or excuse the homicide, devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed amounts to manslaughter, or that the defendant was justifiable or excusable, being an exact rescript of the statute, *supra*, is correct.
3. **SAME—SAME—SAME—SAME—SELF-DEFENSE—NO DUTY TO RETREAT.**—An instruction upon the question of self-defense, that if the defendant could have withdrawn from the danger it was his duty to retreat, is error, the modern doctrine being, that when a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force; and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable.
4. **SAME—SAME—SAME—SELF-DEFENSE—EVIDENCE—SUFFICIENCY.**—Where the defendant testified that he went to the door of his saloon, being drawn there because his brother and the deceased were at the time in the street firing at each other with revolvers, and that while standing there he was fired at by the deceased, and

that he thereupon returned the fire and killed the deceased, there is sufficient evidence, however contradicted, to justify the court in submitting the issue of self-defense to the jury.

5. ~~SAME—SAME—SAME—INSTRUCTIONS—EVIDENCE.~~—Instructions should not ignore any finding of fact which the jury might reasonably make upon the evidence before them.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Fletcher M. Doan, Judge. Reversed.

The facts are stated in the opinion.

E. J. Edwards, Moorman & McFarland, and Frank Cox, for Appellant.

The court erred in charging the jury on the law of self-defense. The court instructed the jury as follows: "If the defendant could have withdrawn from the danger, it was his duty to retreat. This means that between his duty to retreat and his right to kill, the defendant must avail himself of any apparent and reasonable avenue of escape by which his danger might be averted and the necessity of slaying his adversary avoided." This is not the modern doctrine. *People v. Lewis*, 117 Cal. 186, 59 Am. St. Rep. 167, 48 Pac. 1088; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272; *People v. New-comer*, 118 Cal. 263, 50 Pac. 405; *Beard v. United States*, 158 U. S. 550, 15 Sup. Ct. 962.

C. F. Ainsworth, Attorney-General, for Respondent.

The contention on the part of the appellant that the court erred in instructing the jury on the law of self-defense is untenable. This charge is *verbatim* the charge given by the trial court in the case of *People v. Iams*, 57 Cal. 119. This case has been followed and approved by the supreme court of California in *People v. Guidice*, 73 Cal. 226, 15 Pac. 44; *People v. Buggy*, 93 Cal. 476, 29 Pac. 26.

SLOAN, J.—The appellant was indicted and tried at the March, 1898, term of the district court in and for Graham County, for the crime of murder, and found guilty of murder in the second degree. From the order overruling his motion

for a new trial, and from the judgment of conviction, this appeal is taken.

Three of the trial court's instructions are objected to by the appellant as containing reversible error. The first of these reads as follows: "If, after a careful comparison and candid consideration of all the evidence in the case, you have a doubt of the defendant's guilt, it will then be your duty to determine whether such doubt is reasonable, and sufficient, in law, to acquit the defendant. And if after applying the law defining such doubts, as laid down in these instructions, you find that the doubt in question is not a reasonable one, then it will not be sufficient, in law, to acquit the defendant. A doubt, to authorize an acquittal, must be a reasonable one, and it must arise from a careful and candid investigation of all the evidence in the case; and unless the doubt is a reasonable one, and does so arise, it will not be sufficient, in law, to authorize a verdict of not guilty." While not entirely free from criticism, this instruction has been often approved by the courts as well as by text-writers. Kerr on Homicide, sec. 521; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320 and note, 12 N. E. 865, and 17 N. E. 898.

The court charged the jury that "In this case, if you find from the evidence that the defendant fired the fatal shot, then the burden of proving the circumstances of mitigation, or that justify or excuse the homicide, devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." This charge is objected to as not stating the law, but inasmuch as it is an exact rescript of section 1655 of the Criminal Code, it is somewhat puzzling to see why counsel for appellant should have assigned it as error.

Upon the question of self-defense, the court charged the jury in this language: "To justify the killing of another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, or that the circumstances were such as to excite the fears of a reasonable person that the deceased intended to take his life or to inflict on him great bodily harm, and that the defendant really acted under the influence of

these fears; and it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further struggle before the homicide was committed. *If the defendant could have withdrawn from the danger, it was his duty to retreat. This means that, between his duty to retreat and his right to kill, the defendant must avail himself of any apparent and reasonable avenue of escape by which his danger might be averted, and the necessity of slaying his adversary avoided.*" The portion of this charge italicized is specially objected to. It is in almost the identical language used in the charge of the court in the Iams case, 57 Cal. 115,—a charge which, as a whole, was approved by the California supreme court, and on the authority of which this identical instruction has been frequently given by the trial courts of the territory. Its correctness has never before been questioned in this court so far as any reported case discloses. At any rate, this court has not heretofore passed upon the question. An examination of the reported cases bearing upon this point has convinced us that the instruction does not state the law of self-defense as now defined and set down by the more modern American authorities. The Iams case, in so far as this instruction is concerned, has been overruled by the supreme court of California in two cases,—that of *People v. Lewis*, 117 Cal. 186, 59 Am. St. Rep. 167, 48 Pac. 1088, and *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405. In the latter case the law is stated to be that when one, without fault himself, is suddenly attacked in a way that puts his life and bodily safety in imminent hazard, he is not compelled to fly, or to consider the proposition of flying, but he may stand his ground and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary, especially where he is at the time in his own house, and [though] the assailant be not at the time a trespasser. In the case of *Beard v. United States*, 158 U. S. 550, 15 Sup. Ct. 962, the supreme court reviewed at length the cases bearing upon this point, and quoted with approval the summing up of the principle of the right of one to stand his own ground and defend himself when attacked, as made by Rice on Evidence (sec. 360), which is as follows: "A very brief examination of the American authorities makes it evident that the ancient doctrine as to the duty of a person assailed to retreat as far as he can, before

he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed to avoid chastisement or even to save human life; and that tendency is well illustrated by the recent decisions of our courts bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, establishes the doctrine, that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force; and if in the reasonable exercise of his right of self-defense his assailant is killed, he is justifiable. . . . It seems to us that the real question in the case when it was given to the jury was, Was the defendant, under all the circumstances, justified in the use of a deadly weapon in repelling the assault of the deceased? We mean by this, Did the defendant have reason to believe, and did he in fact believe, that what he did was for the safety of his own life or to protect him from great bodily harm? On that question the law is simple and easy of solution, as has been already seen from the authorities cited above." We find from these authorities, as well as others which might be cited, the distinction is made and sharply defined between the case of one who is at the time of the assault upon his own premises and one who is not. To use the language of the California court, "Whatever diversity of opinion may be found in the books on the general proposition of the duty of retreat, the right to stand one's ground when assailed in one's own home or upon one's own premises was never seriously questioned, even by the common-law writers." *People v. Lewis*, 117 Cal. 186, 59 Am. St. Rep. 167, 48 Pac. 1090.

It is contended by the territory, that, even if the instruction we are considering be erroneous, the case should not for that reason be reversed, because no case of self-defense was presented by the evidence. It may have been that the evidence was weak upon that point. Still, the defense was one of self-defense; the case was tried upon this theory, and at the request of both the prosecution and defense the jury was instructed upon the law of self-defense. The testimony of the appellant was, that he went to the door of his saloon, being

drawn there because his brother and the deceased were at the time in the street, firing at each other with revolvers, and that while standing in the door of his saloon, in the presence of his son, he was fired at by the deceased; that he thereupon returned the fire, and killed the deceased. As stated in *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405, "the jury were not bound to take the testimony of appellant as true, but instructions should not ignore any finding of fact which a jury might reasonably make upon the evidence before them." However much the appellant may have been contradicted by other witnesses, it is quite certain from the evidence that he was at the time of the shooting on his own premises; and hence, under the authorities cited above, for this reason, if for no other, the instruction contained reversible error, and the judgment and order will therefore be reversed, and the cause remanded for a new trial.

Street, C. J., and Davis, J., concur.

[Civil No. 649. Filed March 15, 1899.]

[56 Pac. 720.]

EDWARD ARHELGER, Administrator of the Estate of Alexander Graydon, deceased, Plaintiff and Appellant,
v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant and Appellee.

1. APPEAL AND ERROR—NECESSITY FOR WRITTEN OPINION—REV. STATS. ARIZ. 1887, PAR. 948, CONSTRUED—NOT JURISDICTIONAL.—The statute, *supra*, providing that "the opinion in all cases which are reversed and remanded for a new trial shall be in writing," does not apply to a case where the judgment is reversed without being remanded for a new trial. Nor is there anything in the statute, *supra*, which makes the filing of an opinion in any case a jurisdictional prerequisite to the entering of a valid and enforceable judgment.
2. SAME—JUDGMENT—REVERSAL—POWER TO DIRECT TRIAL COURT TO ENTER JUDGMENT—REV. STATS. ARIZ. 1887, PAR. 949, CONSTRUED, AND PARS. 951, 953, CITED.—Paragraph 949, *supra*, providing that when the judgment of the lower court is reversed the supreme court shall proceed to render such judgment as the court below

should have rendered, except when it is necessary that some matter of fact be ascertained, when the cause shall be remanded for a new trial, authorizes the practice of directing the trial court to enter judgment which the appellate court finds should be rendered. This paragraph is directory, and does not prohibit the practice, and the provisions of paragraphs 951 and 953, *supra*, indicate that this is the proper construction.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

E. J. Edwards, for Appellant.

Peter Robertson, for Appellee.

SLOAN, J.—This cause has for the third time been before this court on appeal. At the January (1894) term the cause was reversed, and remanded to the court below for a new trial. *Mutual Life Ins. Co. v. Arhelger*, 4 Ariz. 271, 36 Pac. 895. Upon the second appeal the cause was reversed, and remanded to the court below with instructions to enter its judgment in favor of the Mutual Life Insurance Company of New York, appellee here. No opinion was filed by the court upon this second appeal. *Mutual Life Ins. Co. v. Arhelger*, 5 Ariz. 207. From the judgment entered in accordance with the mandate of this court, issued under the latter judgment, appellant has again appealed.

It is contended by appellant that this court has no power to reverse a cause without rendering a written opinion, or, upon reversal, to direct the lower court to enter a judgment without awarding a new trial. Upon the first contention, it is sufficient to say that paragraph 948 of the Revised Statutes provides that "the opinion in all cases which are reversed and remanded for a new trial shall be in writing." So that, even were this section to be regarded as mandatory and jurisdictional, inasmuch as the judgment of this court on the second appeal reversed the cause, without remanding it for new trial, the statute does not apply. The purpose, doubtless, for requiring the written opinion in any cause that is reversed and remand-

ed for new trial is that the trial court may be apprised of the rulings of the appellate court and be guided thereby upon the subsequent trial. We may add, however, that we see nothing in the statute which makes the filing of an opinion in any case a jurisdictional prerequisite to the entering of a valid and enforceable judgment.

Upon the second contention, paragraph 949 of the Revised Statutes provides that "when the judgment or decree of the court below shall be reversed the supreme court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damages to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial to the court below." Under this section this court is granted full power to enter its own judgment upon the reversal of the cause, unless a new trial be found necessary or proper in order that material facts affecting the judgment may be determined. Appellate courts have almost uniformly favorably regarded the practice of directing the trial court to enter the judgment which the appellate court finds should be rendered. This practice amounts to nothing more, in effect, than sending a case down for the trial court to enforce and carry out the judgment or decree of the appellate court. We do not regard, therefore, section 949 as prohibiting this practice, nor do we construe it otherwise than as directory. That this is the proper construction is indicated by the provisions of paragraph 951 of the Revised Statutes, which requires the issuance of a mandate on all judgments rendered by this court, and also by paragraph 953, which requires that every judgment of this court shall be certified down to the clerk of the court below to be attached to the judgment-roll, and a minute of which is required to be by said clerk entered on the docket. These provisions of the statute would appear to be without meaning or utility if the judgment of this court may not be enforced and carried out by the process of the trial court. We think this court had ample power to enter the judgment it did on the second appeal, and to direct the trial court to enter judgment in accordance with the order of this court. The judgment is therefore affirmed.

Street, C. J., and Davis, J., concur.

[Civil No. 643. Filed March 15, 1899.]

[56 Pac. 721.]

**EDWIN EGAN et al., Plaintiffs and Plaintiffs in Error, v.
MATEO ESTRADA et al., Defendants and Defendants
in Error.**

1. **APPEAL AND ERROR—PARTIES—NECESSITY OF JOINING ALL PARTIES TO JUDGMENT—SEPARATE JUDGMENTS AFFECTING SINGLE DEFENDANT—IRRIGATION—PRIORITY OF RIGHT.**—In a suit to determine the question of priorities of right to the use of water between plaintiffs and a number of defendants, and for an injunction, it being in its nature a suit in equity calling for separate judgments, a writ of error may be brought against one defendant to review the judgment between plaintiffs and said defendant without the necessity of making all the parties to the judgment parties to the writ of error.
2. **EQUITY—TRIAL—JURY—SPECIAL VERDICT—ADVISORY—REV. STATS. ARIZ. 1887, PAR. 786, CONSTRUED.**—Paragraph 786, *supra*, providing that a special verdict shall, as between the parties, be conclusive as to the facts found, does not modify the rule in equity trials that where a court submits certain questions to the jury the answers are advisory only, and may be disregarded by the court.
3. **IRRIGATION—APPROPRIATION—ADVERSE USER—STATUTE OF LIMITATIONS—CANNOT START TO RUN WHILE WATER SUFFICIENT FOR ALL—WHAT CONSTITUTES ADVERSE USER—WHEN STATUTE COMMENCES TO RUN—TO WHAT WATER THE USE IS ADVERSE—SUBSEQUENT APPROPRIATOR CAN USE UNDER HIS APPROPRIATION WITHOUT USE BEING ADVERSE.**—When there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water to start the statute of limitations running. Each is entitled to the use, and it is only when the water becomes so scarce that all of the parties cannot be supplied, and that one appropriator takes water which by priority belongs to another appropriator, that there is an adverse use. The statute commences to run from the time when such adverse use is made of the water, the adverse use being only of that water which the prior party is entitled to. When there is a sufficiency of water in the river, the prior appropriator is not entitled to the water used by the subsequent appropriator, and the subsequent appropriator can use under his appropriation without being an adverse user.
4. **SAME—SAME—SAME—JURY—INSTRUCTIONS—FAILURE TO DEFINE ADVERSE USE OF WATER—MISLEADING JURY TO BELIEF THAT PEACEABLE POSSESSION OF DITCH FOR FIVE YEARS GAVE RIGHT TO WATER.**—An instruction that "If you find that the defendant was for any five

consecutive years after he built his ditch, . . . and before the commencement of this action, in the peaceable and adverse possession of his ditch," and of the water diverted thereby from the river, "and did for any such period of five years use such water in irrigating . . . his land, then you are instructed that such adverse use, for such period, gave him a good and valid right to said water against the plaintiffs, and made his right to use such water a prior right to any right that plaintiffs may have," is erroneous. It does not define adverse use of water, and has the tendency to lead the jury to the conclusion that if the defendant had been in peaceable possession of his ditch for five years such possession would give him a prior right.

5. APPEAL AND ERROR—JUDGMENT—WHEN RENDERED IN SUPREME COURT—REV. STATS. ARIZ. 1887, PAR. 949, CONSTRUED.—Under paragraph 949, *supra*, providing that when the judgment of the court below shall be reversed, the supreme court shall render such judgment as should have been rendered below, except when it is necessary that some matter of fact be ascertained, or damage be assessed, or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial. Where all the evidence is before this court, and there are no new facts to be discovered, this court will proceed to render such judgment as the district court should have rendered.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. J. D. Bethune, Judge. Reversed.

Statement of facts:—

The plaintiffs in error, Edwin Egan and Rafael Vasquez, as plaintiffs in the district court, brought an action against the Santa Rita Land and Cattle Company, Colin Cameron, Thomas Bayze, Francisco Q. Acebedo, Benjamin Acebedo, Mateo Estrada, and Julian Tanori to obtain a perpetual injunction restraining the defendants from using the water out of an irrigating ditch adverse to plaintiffs, and for the determination and adjudication of priorities of appropriation of the water, as between the respective parties, flowing from the Santa Cruz River. The cause was tried before a jury on general and special issues. Upon the general issue the jury returned a verdict for plaintiffs, and against the defendants, as to the use of water for one hundred acres of land,—fifty acres to each. Upon the special issues they returned a special verdict that the defendant Mateo Estrada had been in the adverse and peaceable possession of the right to divert from

the Santa Cruz River sufficient water to irrigate thirty-five acres of land for the period of five consecutive years from the time he built his ditch, in 1878, using the same adversely to plaintiffs, and a special verdict that the appropriation of water from the Santa Cruz River by Estrada was subsequent to plaintiffs' appropriation; whereupon the court rendered judgment for plaintiffs against all of the defendants except Estrada, and adjudged that he have the prior use of the waters of said river, as against the plaintiffs, sufficient in amount to irrigate thirty-five acres. Plaintiffs bring their writ of error against the defendant Estrada alone. Plaintiffs' principal assignment of error was, that the verdict of the jury as to five years' adverse possession in Estrada was not supported by the evidence; that the court ought to have disregarded it, and have rendered a judgment on the general verdict and on the special verdict; that the location and appropriation of Estrada was subsequent to the appropriation by plaintiffs. The defendant in error filed a motion to dismiss plaintiffs' writ of error, because all of the defendants to the action in the district court were not made defendants to the writ of error, upon the rule that all the parties to, and affected by, the judgment appealed from must be included in the writ of error.

Barnes & Martin, for Plaintiffs in Error.

Estrada pleaded five years' adverse and peaceable possession, and enjoyment thereof for more than five years before the complaint was filed.

The statute of limitations does not apply, but it has been held that a prescriptive right can be acquired by lapse of time. At common law the prescription must have been based upon twenty years' adverse and uninterrupted possession, and a grant was implied after such twenty years' uninterrupted possession; but this twenty years has been reduced to five years as the period fixed by statute as a bar to entry on land. Kinney on Irrigation, 293.

This doctrine is based on the decisions in California.

In *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. 623, it was held that a prescriptive right must be based upon a quiet, open, notorious, and continuous appropriation, use, and enjoyment of the water at all times and

seasons under the claim of right and title to do so adversely to the whole world, and was so used and enjoyed without let, hindrance, and objection by any one. It was there held that while there was sufficient water flowing in the river to supply the wants and demands of all parties, its use by one could not be an invasion of the rights of another, and as the court found in that case, as a matter of fact, that until within a year or two prior to the commencement of the action there was sufficient water flowing in the river to supply the wants and demands of all parties, plaintiffs acquired no right by prescription. See, also, *Grigsby v. Clear Water Co.*, 40 Cal. 406; *Ledu v. Jim Yet Wa*, 67 Cal. 348, 7 Pac. 731.

S. M. Franklin, for Defendants in Error.

The jury found, the court found, and the facts sustain the finding, that for more than five years prior to the filing of this action Estrada had been in the open, notorious, adverse, peaceable possession and enjoyment, against the plaintiffs and the whole world, of sufficient water to irrigate thirty-five acres. That such adverse user gives a good title and prior right, see *Davis v. Gale*, 32 Cal. 32; *Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Thomas v. England*, 71 Cal. 456, 12 Pac. 491; *Webber v. Clark*, 74 Cal. 18, 15 Pac. 431; *Hesperia Land and Water Co. v. Rogers*, 83 Cal. 10, 17 Am. St. Rep. 202, 23 Pac. 196.

STREET, C. J. (after stating the facts).—1. It is a well-settled rule that all parties defendant shall be included in a writ of error when it is sought by the appeal to reverse a judgment in which all the parties are interested. The nature of this action calls for a separate judgment. The prayer of the complaint is that the whole question of priorities to the use of the water be examined into, and judgment rendered for or against each of the parties to the action according to facts found. A court of equity is empowered and has placed upon it the duty of rendering a judgment in favor of plaintiffs as against some of the defendants, and in favor of some of the defendants and against plaintiffs, if the facts so warrant, each defendant being in that particular a separate party; and when a court of equity renders a judgment for plaintiff against certain defendants, and for some other of the defendants

against the plaintiff, there would be no technical reason for, or equitable purpose in, making those defendants against whom a judgment had been entered parties to a writ of error brought by plaintiff against other defendants, in whose favor a judgment had been rendered against him. The judgment sought in this case to be corrected is a judgment between plaintiffs and the defendant Estrada alone, as to the priority of right to the use of water; and hence does not come within the rule that "all parties to the judgment should be made parties to the writ of error." Wherefore the motion of defendant in error to dismiss the writ will not be entertained.

2. Paragraph 784 of the Revised Statutes of Arizona prescribes that "a verdict of the jury is either general or special. A general verdict is one whereby the jury pronounces generally in favor of one or more parties to the suit upon all or any of the issues submitted to them. A special verdict is one wherein the jury find the facts only on the issues submitted to them under the direction of the court." Paragraph 785 of the Revised Statutes of Arizona prescribes: "The special verdict must find the facts as established by the evidence, and not the evidence by which they are established; and the finding must be such that nothing remains for the court but to draw from such facts the conclusions of law." Paragraph 786 of the Revised Statutes of Arizona prescribes: "A special verdict so found shall, as between the parties, be conclusive as to the facts found." Under those provisions of the law, and especially under paragraph 786, it is contended by the defendant in error that the special verdict finding that he had been in the adverse use of the water as against the plaintiffs in error for five continuous years is binding between the parties, and that the court would be compelled to enter a judgment in accordance therewith, and not treat it, under the equity rule, as advisory only. We do not understand that the provisions of paragraph 786 above referred to are a modification of the well-known rule in equity trials, that where a court submits certain questions to the jury to be answered the answers are advisory only, and that the court may disregard the answers, and find for itself different from the findings by the jury. In this case we have read the evidence taken at the trial carefully from beginning to end, and we nowhere find any evidence which would support the findings

of the jury that the defendant Estrada had been in the adverse use of the water, as against the rights and claims of plaintiffs, for five consecutive years. The evidence shows that the plaintiffs had been in the use and enjoyment of water running through a ditch taken from the Santa Cruz River for a long period of time, running back possibly as early as 1872, certainly as early as 1875 and 1876, and that defendants, from the opposite side of the same river, had been in the use and enjoyment of water running through a ditch since a period as early as 1878, but it fails to show that there had been an adverse user of the water until 1894. When there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water to start the statute of limitations running. Each is entitled to the use of the water, and it is only when the water becomes so scarce that all of the parties cannot be supplied, and that one appropriator takes water which by priority belongs to another appropriator, that there is an adverse use. The statute commences to run from the time when such adverse use is made of the water, the adverse use being only of that water which the prior party is entitled to. When there is a sufficiency of water in the river, the prior appropriator is not entitled to the water used by the subsequent appropriator, and the subsequent appropriator can use under his appropriation without being an adverse user. We can only account for the verdict that Estrada had been in the adverse use of the ditch, as against plaintiffs, for five years, from the following instruction given by the court: "If you find that defendant Estrada was, for any five consecutive years after he built his ditch, in the year 1878, and before the commencement of this action, in the peaceable and adverse possession of his ditch, and of the waters which he should divert from the Santa Cruz River by means of said ditch, and did for any such period of five years use and employ such water in irrigating and cultivating his land, then you are instructed that such adverse use, for such period, gave him a good and valid right to said waters against the plaintiffs, and made his right to use such water a prior right to any right that plaintiffs may have, and in that event only you will find for the defendant Mateo Estrada." The instruction as given is erroneous. It does not define adverse use of water. It clearly had the tendency to lead the jury

to the conclusion that, if the defendant had been in the peaceable possession of his ditch for five years, such possession would grant him a prior right. Under this instruction, we would either have to reverse the case, and remand it for a new trial, or correct the judgment ourselves.

3. Paragraph 949 of the Revised Statutes of Arizona, under the chapter relating to judgments rendered by the supreme court, provides: "When the judgment or decree of the court below shall be reversed, the supreme court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or damage be assessed, or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below." All of the evidence being before this court, and there not being any new facts to be discovered, this court will proceed to do that which the district court should have done, which was to have disregarded the finding of the jury that the defendant Estrada had been in the adverse and peaceable possession of the right to divert sufficient water from the Santa Cruz River for a period of five successive years from the time he first built his ditch, using the same adversely to plaintiffs, as not being supported by the evidence. It is not in harmony with the findings of fact that Estrada was subsequent in his right of appropriation to plaintiffs, and not in harmony with the general verdict. The judgment of the district court as to defendant Mateo Estrada is reversed, and judgment is ordered for plaintiffs Edwin Egan and Rafael Vasquez against the defendant Mateo Estrada for the prior right to the use of water from the Santa Cruz River through the ditch used by plaintiffs.

Sloan, J., Davis, J., and Doan, J., concur.

[Civil No. 637. Filed March 15, 1899.]

[56 Pac. 732.]

WILLIAM D. HALE, as Receiver of the American Savings and Loan Association, Plaintiff and Appellant, v. THOMAS HUGHES et al., Defendants and Appellees.

1. TAXES AND TAXATION—TAX-DEED—NOTICE OF INTENTION TO APPLY FOR—LAWS ARIZ. 1893, ACT NO. 84, SEC. 20, CONSTRUED—NEED NOT BE SERVED BY PURCHASER INDIVIDUALLY.—The statute, *supra*, requiring the purchaser of property sold for delinquent taxes to serve upon the owner written notice of his intention to apply for tax-deed, does not require such notice to be served by the purchaser himself; it is sufficient if legal notice be served.
2. SAME—SAME—EVIDENCE—ADMISSIBILITY—LAWS ARIZ. 1893, ACT NO. 84, SECS. 21, 22, CITED.—A tax-deed reciting all of the matters prescribed in sections 21 and 22, *supra*, is properly received in evidence, where the record fails to disclose that the recitals were incorrect, or that any effort was made to prove them incorrect.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

Statement of facts:—

Appellant, Hale, as receiver, brought an action in the district court of Pima County against Hughes et al., appellees, to obtain judgment upon a debt against Thomas Hughes, and to foreclose a mortgage which had been executed by said Hughes to secure the debt. The defendants other than Hughes were made parties only to the foreclosure proceedings. The defendant Freeman made answer for himself, and claimed title to the real estate covered by the mortgage, by virtue of tax-deeds, free and clear of the mortgage-deed and mortgage-lien. Judgment was rendered for plaintiff as to the debt against Hughes, but in favor of defendant Freeman for all that portion of the real property included in the mortgage-deed, described as lot 1 in block 214 of the city of Tucson, by virtue of the tax-deed set up by the said Freeman, dated on the twenty-sixth day of August, 1896. The court found that the deed extinguished the mortgage-lien on said property, and further found that, because of redemption by the plaintiff

of a subsequent tax-sale and adjustment of accounts in regard thereto, Freeman should pay to plaintiff the sum of \$143.13, with interest from the first day of July, 1898, at the rate of seven per cent per annum, and that upon the payment of the same by Freeman he should be let into possession of said lot 1, block 214. From that judgment in favor of defendant Freeman, Hale, the receiver, makes appeal to this court, and assigns as error that the court erred in admitting in evidence the tax-deed for lot 1, block 214, for the reason that "the proof of service of notice of intention to apply for a tax-deed does not state facts showing and establishing the service by the purchaser of the property described in the notice, or his assignee, or any notice, and that such notice is insufficient, and for the further reason that the tax-deed for said lots shows that said real estate was assessed to the Thomas Hughes Hardware Company, and was sold for taxes on personal property assessed to the same company."

W. H. Stilwell, for Appellant.

C. W. Wright, for Appellees.

STREET, C. J. (after stating the facts).—1. Section 20 of act No. 84 of the Session Laws of 1893 provides "that the purchaser of the property sold for delinquent taxes, or his assignee, must, thirty (30) days previous to the time for the redemption or thirty (30) days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice stating that said property, or a portion thereof, has been sold for delinquent taxes, giving the date of sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed," etc. The title of the property was in James A. Finley, and had been conveyed to Finley by Thomas Hughes and wife by deed dated July 11, 1893, in trust for the payment of certain promissory notes and indebtedness of Thomas Hughes. The tax-sale was upon the delinquent tax list of Pima County for the year 1894. On July 11, 1896, Freeman caused to be served upon Finley the following notice:—

"Tucson, Arizona, July 11th, 1896. To James A. Finley, Trustee—Sir: You are hereby notified, in compliance with section 20 of act No. 84 of the seventeenth legislative assembly of the territory of Arizona, that all of the following described pieces of property, situate in the city of Tucson, county of Pima, territory of Arizona, to wit, lot one (1), and improvements, in block 214, in Tucson, Arizona, was on the 2nd day of July, 1895, sold for delinquent taxes; that the amount for which it was sold was \$416.73; that there is due upon said property the said sum of \$416.73, together with thirty per cent on said sum, to wit, \$125.01, making a total now due upon said property, and necessary for the redemption of the same, the sum of \$541.74; that the undersigned, who is the owner of the certificate of said tax-sale (being the assignee of Herbert Tenney, the purchaser of said property at said tax-sale), will apply on the 15th day of August, 1896, for a tax-deed for said property. Yours, etc., M. P. Freeman."

The proof of service of which is as follows, to wit:—

"Territory of Arizona, county of Pima—ss.: Wiley E. Tussing, being duly sworn, on oath says that on the 11th day of July, 1896, at Tucson, in said Pima County, he did serve a notice in writing upon James A. Finley, trustee, personally, to the effect that M. P. Freeman would apply for a tax-deed for all the following described pieces of property, situate in the city of Tucson, Pima County, Arizona Territory, to wit, lot one (1) and improvements, in block 214, in Tucson, Arizona; a full and true copy of which said notice in writing is hereto annexed, and made a part hereof. Wiley E. Tussing.

"Subscribed and sworn to before me this 11th day of July, 1896. [Notary public seal.] Selim M. Franklin, Notary Public."

By an inspection of the written notice it will be found to contain all of the statutory requisites, but the objection to the notice urged by appellant is that it was not served by Freeman in person; that is, that he himself, individually, did not hand it to the owner. The purpose of the statute is to have the owner or occupant notified; and, while the statute says that the purchaser or his assignee must serve upon the owner the notice, the statute is fully complied with when there is due proof that a legal notice in writing has been

served. To give the strict construction of the statute asked by appellant would be to work in many instances an impractical and almost impossible thing. The purchaser may have a residence abroad; and to require him to come from his home, out of the territory, to personally hand to the owner or occupant a notice would be putting a useless construction upon the statute. It might be that he was infirm, and not able to personally walk about and hunt the owner up and personally hand to him the notice. We cannot give to this statute or the language used in it so cramped a construction.

2. The tax-roll for 1894 shows that lot 1, block 214, the property described in the tax-deed, in the year 1894 was assessed to the Hughes Hardware Company; and it also shows that the assessment of the personal property of the Hughes Hardware Company was charged to that lot. There is no evidence as to whether the Hughes Hardware Company was in possession of that lot, or, if in possession, as to what the character and nature of the possession were, and the record fails to show that the assessment of the personal property of the Hughes Hardware Company to that lot was illegal. The record fails to show any effort to have the matter corrected, if it were erroneous, and fails to show that any process had been sought or obtained to correct the erroneous charge, if error it was. It is assumed by counsel for appellant that it was erroneous, and he asks this court to so find. It stands admitted that the title to the real property was in Finley. Revised Statutes (par. 2631) says: "All personal property in the hands of any trustee, agent, administrator, executor, or receiver, and all personal property mortgaged or pledged shall, for the purposes of taxation, be deemed to be the property of the person who has possession thereof." And, for aught the record discloses, the personal property may have been in the possession of Finley, the owner of the real estate. Paragraph 2640 contains the same provision, and it also provides "that the assessor shall demand from each person and firm a statement of all the real estate and personal property claimed by, or in the possession or control of, such person or firm"; and provides "that if any person, officer, or agent shall neglect or refuse on demand of the assessor, or his deputy, to give under oath or affirmation the statement required by this section, or if the owner of any property not listed by

another person shall be absent or unknown, the assessor shall fill out a list for such person, putting therein all taxable property which he has reason to believe is owned by, or in the possession or control of, said person, officer, or agent liable to taxation." Section 21 of act No. 84 of the Laws of 1893 provides "that the matters recited in the certificate of sale must be recited in the deed, and said deed duly acknowledged and approved is conclusive evidence that (1) the property was assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law; (4) at a proper time and place the property was sold as prescribed by law, and by the proper officer; (5) the person who executed the deed was the proper officer." Section 22 provides that it is *prima facie* evidence of all other facts therein stated, and of the regularity of all other proceedings, from the assessment by the assessor up to the execution of the deed. The deed executed to Freeman by the tax-collector, and introduced in evidence, and made a part of the record, recites all of the matters prescribed in sections 21 and 22 of act No. 84; and the record fails to show that the recitals are incorrect, or that any effort was made to prove them incorrect. The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 647. Filed March 15, 1899.]

[56 Pac. 737.]

WILLIAM STOWE DEVOL, Plaintiff and Appellant, v.
THE BOARD OF REGENTS OF THE UNIVERSITY
OF ARIZONA, Defendants and Appellees.

1. UNIVERSITY OF ARIZONA—REGENTS—EMPLOYMENT OF INSTRUCTORS—NOTICE OF DISMISSAL—LAWS ARIZ. 1885, ACT APPROVED MARCH 12, SEC. 11, AS RE-ENACTED AND REVISED BY REV. STATS. ARIZ. 1887, PAR. 2496, CONSTRUED.—Under the statute, *supra*, providing that the board of regents of the University of Arizona shall have the power to remove any officer or employee when in their judgment the interests of the university require it, the board has no power to enter into a contract with an instructor providing that the

employment shall be terminated only upon notice for a fixed time, and no action can be maintained by an instructor dismissed without notice for salary during the time of notice provided thereby.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Hereford & Hazzard, for Appellant.

Defendant contended that paragraph 2496 of the Revised Statutes of Arizona, giving the board "power to remove any officer or employee . . . when in their judgment the interests of the university require it," rendered the board's contract with the plaintiff void. We do not deny the board's power to remove plaintiff. Had it lacked the power, we might have brought a suit for an injunction instead of for damages. In the absence of paragraph 2496, professors might have fixed terms of office which the board could not disturb. But paragraph 2490 also gives the board power to contract and to be sued. A case completely on all-fours with this is the case of *The Board of Regents of Kansas State Agricultural College v. Mudge*, 21 Kan. 223, in which the court decided that the contract was binding, and the plaintiff recovered the amount of his salary for three months following his discharge as damages.

William H. Barnes, for Appellees.

STREET, C. J.—The appellant, William Stowe Devol, brought an action against the board of regents of the University of Arizona, in the district court of Pima County, to recover the sum of five hundred dollars, and alleges that on the fifteenth day of January, 1895, the defendant employed him as professor of agriculture at the University of Arizona, at an agreed salary of \$1,750 per year; that by the terms of the contract it was provided that either party should have three months' notice of the termination of said employment; that on the first day of July, 1896, the salary was raised to two thousand dollars per year; that he performed all of the duties faithfully; and that on the 30th of October, 1897, with-

out any notice whatever, and in violation of the terms of employment, he was dismissed and discharged from the employment as professor, to his damage in the sum of five hundred dollars. The defendant demurred to the complaint, but the record fails to show that the demurrer was ever called up for trial. The defendant also filed a general denial. The findings of the court and judgment were in favor of the defendant, from which the plaintiff appealed.

The assignments of error relate principally to the admission and rejection of evidence, but, upon the view we take of the case, it will be unnecessary for us to examine the record and rule upon such assignments. The University of Arizona is of legislative creation, created by an act of the legislative assembly of Arizona of date March 12, 1885, re-enacted and revised by the legislative assembly of 1887. Both acts provide that the government of the university shall vest in a board of regents. Section 11 of both acts recites that "the board of regents shall have the power to remove any officer or employee connected with the institution other than the chancellor or member of the board of regents, when, in their judgment, the interests of the university require it." By that act, the full power of hiring and discharging any member of the faculty is given to the board of regents, to be exercised in their own wise discretion. The university is a public institution, placed under the control of the board of regents, with full powers to manage the same, subject only to the will of the legislature. Appellant claims that the board had no right to discharge him without giving him three months' notice, and the amount that he seeks to recover from the board is for the time that he remained idle after he was discharged by the board,—that is, for the months of November, December, and January,—without any pretense that he had rendered any service during those months. He asks this by virtue of a resolution of the board of regents, which is as follows: "On motion, the following resolution was duly adopted: Resolved, That it shall be considered as a part of the contract of employment of all professors, instructors, and members of the station council employed by the university that such employment may be terminated by either party by giving three months' notice to the other party; provided, however, that any such professor, instructor, or member of the station council may

be discharged for just cause at any time." Appellant claims that the terms of the resolution were a part of his contract. He was employed by Theodore Comstock, president of the university, under resolution of the board of regents of date October 5, 1894, which is as follows: "It was duly ordered that President Comstock be authorized to take the proper steps to the filling of the position of professor of agriculture and horticulture in the college, and agriculturalist and horticulturalist in the experimental station." President Comstock made negotiations with appellant, and closed the contract with him, with the understanding between the two, by virtue of the resolution above recited, that three months' notice would be required to either party to terminate the employment, and the agreement between Comstock and appellant was reported to the board of regents, and the board, on January 7, 1895, ratified the action of President Comstock. When the legislative assembly gave the board of regents the power to hire and dismiss the employees, "when, in the judgment of the board, the interests of the university require it," they did not grant to the board the power to bind themselves, or to bind others who might be their successors on the board, by a contract different from that which was prescribed by the statute. They gave them no power to fix times of notice for the discharge of employees. If the board could fix such time at three months, to bind themselves or their successors, they could fix it at six months, or nine months, or a year, which would be in direct violation of the interests of the institution as the legislature had created it. One board of regents about going out of office, and desiring to extend a favor to those already employed by them, or desiring to place in the employment of the university some favorite, might pass a resolution that he could not be discharged with less than a year's notice; and, however much the succeeding members of the board might deem it to the best interests of the university to discharge the person so employed, they would be powerless to relieve the university, if a resolution of that nature were allowed to be of controlling effect upon the statute.

It is suggested by appellant that, if the statute did reserve to the board the power of removal, yet the resolution of the board, and the agreement in conformity with it, made a contract binding on the board to the extent that they would

have to pay appellant for three months' idle time. Were the contract their individual contract, it might be so, but it is a public contract, by a public board, for a public institution, and the board has no power to pay out public money for services not rendered. If, after his discharge, another filled his place, the territory would have to pay double for single service. The public money cannot be so used or the legislative will so thwarted. The board had no power to make such a contract. Appellant's contract with them was under the statute, not under the resolution. The court committed no error in making its finding and rendering judgment for the defendant. The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 636. Filed March 15, 1899.]

[56 Pac. 723.]

CLARA KINNEY, Plaintiff and Appellant, v. JAMES A. FLEMING et al., Defendants and Appellees.

1. MINES AND MINING—LOCATIONS — ABANDONMENT — EVIDENCE — RELOCATION.—A mining claim was located in the name of four persons, by one person, who testified he wrote the names of the other co-locators to the location notice, and only one of the others had anything to do with the claim, and that, after making a little monument and sinking about three feet, he and the one of his partners mentioned decided that it was no good, destroyed the monument, and abandoned it. Upon such abandonment the ground is subject to immediate relocation by others without waiting until the location became forfeited by reason of non-compliance with the statute requiring the sinking of a discovery shaft, recording notice, and building the monuments within ninety days.
2. SAME—SAME—EVIDENCE—LOCATION NOTICE—ACTS OF LOCATION INDEPENDENT OF NOTICE.—Where an action to quiet title to mining ground is brought before the expiration of the time allowed by statute for the filing of the notice of location, acts of location, independent of the certificate of location, are admissible.
3. SAME—SAME — LOCATION NOTICE — LAWS ARIZ. 1895, ACT No. 42, SECS. 1, 2, CONSTRUED—SUFFICIENCY OF NOTICE—EVIDENCE.—Location notice examined and held to be a sufficient compliance with the requirements of the statute, *supra*, to be admissible in evidence.

4. SAME—SAME—SAME—MINE "PERMANENT MONUMENT" WITHIN THE MEANING OF LAWS ARIZ. 1895, ACT NO. 42, SEC. 1—POSITION OF MINE.—A mine referred to by name, as was the Joyce Mine, is a permanent monument, within the meaning of the statute, *supra*, and if the claim is stated to lie "just east of the Joyce Mine," its position is defined.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

J. S. Sniffen, and Owen T. Rouse, for Appellant.

No mere relocation for forfeiture made before the forfeiture actually attaches by actual default would be valid to defeat the claim. *Jupiter Min. Co. v. Bodie Cons. Min. Co.*, 7 Saw. 96.

Where one locates a claim before the former owner is in default, such relocation does not lay the foundation for a valid claim, nor does the relocation become valid upon the first locator's subsequent default. It is a mere nullity. *Slavonian Min. Co. v. Perasich*, 7 Fed. 331; *Belk v. Meagher*, 3 Mont. 65; *Belk v. Meagher*, 104 U. S. 279.

A failure to comply with local rules and regulations and customs does not work a forfeiture unless the rules expressly so declare; and where parties claim a forfeiture under local rule or custom, the rule is to be strictly construed against a forfeiture. *Rush v. French*, 1 Ariz. 99; *Jupiter Min. Co. v. Bodie Cons. Min. Co.*, 7 Saw. 96; *Jupiter Min. Co. v. Bodie Cons. Min. Co.*, 11 Fed. 680; *Oreamuno v. Uncle Sam Min. Co.*, 1 Nev. 215; *Colman v. Clements*, 23 Cal. 248.

Mere failure to do work, while it may cause a forfeiture, does not constitute an abandonment. *Lakin v. Sierra Buttes G. M. Co.*, 25 Fed. 337; *Morenhaut v. Wilson*, 52 Cal. 263; *Depuy v. Williams*, 26 Cal. 309.

Edwards & Stoneman, for Appellees.

In proving the identity of a mining claim the rule is, that monuments will control courses and distances. *McEvoy v. Heyman*, 15 Min. Rep. 397; *Cullacott v. Cash*, 8 Colo. 179; *Book v. Justice*, 58 Fed. 106; *Higuera v. United States*, 5 Wall. 827; *Howe v. Bass*, 2 Mass. 380, 3 Am. Dec. 59; *Bradford v. Hill*, 1 Hayw. 30, 1 Am. Dec. 546.

If the center line be sufficiently described, it is enough to state that the claim is for a specified number of feet on each side of the line. *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361; *Duryea v. Boucher*, 67 Cal. 141, 7 Pac. 421; *Bennett v. Harkrader*, 158 U. S. 441, 15 Sup. Ct. 863.

Notices of mining claims should be liberally construed. *Book v. Justice*, 58 Fed. 107.

STREET, C. J.—1. The appellant brought an action in the district court of Gila County against appellees to quiet title to a certain mine or mining claim, located on the twelfth day of September, 1896, called the "Deep Down Mining Claim." Defendants made answer, and denied the validity of the location of the Deep Down mining claim, but admitted the acts of the location thereof. As a further answer they alleged that they were in possession of the ground covered by the Deep Down mining claim, by virtue of being the owner of a mining claim called the "Skull," located on the fourth day of September, 1896. Said action was not brought as an adverse, pursuant to an application for patent. Neither party at the time of the commencement of the action or at the trial thereof had made application for patent to either of these claims. On the trial of the case plaintiff asserted, and adduced some evidence to prove, that at the time defendants had located the Skull mining claim the ground was not open to location, by reason of the same having been located on the 13th of June, 1896, by A. O. Crane, John Kasser, George Gessell, and W. J. Grandstaff, and known as the "Damfino Mining Claim"; that the ground covered by both the Skull claim and the Deep Down claim was the same as that covered by the Damfino mining claim; and that the ground was not open to location or relocation until the expiration of ninety days from the 13th of June, 1896,—to wit, the 11th of September, 1896. It was asserted by the defendants that the Damfino mining claim, located on the 13th of June, 1896, was not a valid mining claim, and, further, that before the Skull mining claim was located the locators of the Damfino mining claim had abandoned the ground. The cause was tried to the court without a jury, and upon that point the court found that "on the 13th day of June, 1896, Crane, Kasser, Gessell, and Grandstaff attempted to locate a mining claim em-

bracing substantially the same property as that located by the defendants, which attempted location was not sufficient to withdraw the same from the public domain of the United States, and that the locators thereof were not in possession of said property on the 4th day of September, 1896." The assignments of error and the argument of appellant related principally to the judgment of the court being contrary to the evidence in the case, and urged particularly the existence of the Damfino claim at the time the Skull claim was attempted to be located.

2. It is well settled by numerous decisions, and by our own court, that when a location has once been made the ground covered thereby is not public mineral land open to location, and no one can make any other location thereon so long as the first location is a subsisting one; so, if appellant's contention that the Damfino claim was existing at the time the Skull claim was located be true, the finding of the court would be erroneous. We have made a careful examination of the evidence in regard to the location of the Damfino mining claim, and of the acts of the parties whose names were connected with the location after the date the location notice bore. Grandstaff alone made the location and wrote the names of the other co-locators to the location notice. None of those whose names are on the location notices ever did anything, or ever attempted to do anything, except Grandstaff and Gessell, and none but Grandstaff and Gessell seemed to know anything about the claim, or, in fact, to know that their names were on the location notice. Grandstaff says that he "made a little monument, and put the notice in it, and built another one right up above it; that he sunk about three feet; that one of his partners [Gessell] came down and looked at it, and they both decided that it was no good, and destroyed the monument, and that that was all that was ever done on the claim; that the claim was abandoned because it was no good; that, in two or three days after he had written the notice and built the monument, he went away, and left the territory, with the intention of having nothing further to do with that claim, as he regarded it of no account. Gessell and myself both abandoned the claim. The others never did anything with it." Abandonment has always rested in intention, as well as in acts accompanying the intention. Under the statute a locator

of a mining claim may have ninety days in which to sink his discovery shaft, record his notice, and build his monuments; yet if, after putting up the initial monument and examining the claim, he wishes to abandon it, and does tear down the monument and go away with the intention of not going back, and, in fact, pays no further attention to the claim, the land covered by the claim is open to location the moment such act takes place and such intention is formed, and others wishing to relocate the ground would not be required to wait until it became forfeited by reason of a non-compliance with the statute in sinking a discovery shaft, recording the notice, and building monuments.

3. Objection is made by appellant to the introduction of the location notice of the Skull mining claim by appellees, and, because it was received as evidence, she assigns error. By looking at the record we discover that appellant brought her action before the expiration of the time allowed by statute for the filing of the notice of location with the recorder; and hence, when appellant attacks the location of the Skull claim, appellees would have to show only the acts of location, independent of a certificate of location. Session Laws of 1895 (act No. 42, sec. 1) prescribe: "Every notice of a location of a mining claim shall contain: 1st. The name of the claim located. 2nd. The name of the locator. 3rd. The date of the location. 4th. The number of feet in length of said claim and the number of feet claimed on each side of the center of the discovery shaft, lengthwise of the claim. 5th. The general course of the lode, deposit or premises located. 6th. The locality of the claim with reference to some natural object or permanent monument as will identify the claim." Section 2 provides that a certificate not containing these things shall be void, which, by inference, means that, if it does contain these things, it is valid. Let us see the location notice: "Notice is hereby given that the Skull mining claim, containing mineral-bearing quartz, rock, or earth in place, located by James A. Fleming and J. M. Ford, on this 4th day of September, 1896, has been located for mining purposes. Said claim is 1,500 feet in length; and we claim 300 feet on each side of the center or discovery shaft, for the full length of the claim. The general course of this lode deposit or premises is easterly and westerly. This claim is situated in Globe

Mining District, Gila County, territory of Arizona, about six miles in a westerly direction from Globe, about one half mile south of the junction of Webster and Lost gulches, and lays just east of the Joyce Mine." It is signed by James A. Fleming and J. M. Ford, locators; contains the file mark of December 3, 1896, which is within the ninety days from date of location, and after the suit by appellant was commenced. It is readily to be seen that every specification of the statute has been complied with. It is true that the position of the monuments as built upon the ground was described in such a way as to direction as to be confusing; but if the statutory requirements were complied with, the notice would be sufficiently correct to allow its admission as evidence when offered by defendant. It has been repeatedly held that a mine referred to by name, as was the Joyce Mine, is a permanent monument, and, if the claim lay just east of the Joyce Mine, its position is defined. Referring to a mine in a location notice casts upon the party attacking the notice the burden of showing that there is no such mine as referred to. The evidence of the locator of the Skull mining claim described particularly and distinctly the nine monuments that were built, marking its exterior boundaries; and, even if appellees could have been called upon to produce their certificate of location in the trial of a suit which had been commenced before the time in which the statute required a location notice to be recorded, we hold, with the district court, that the location notice complied with the statute sufficiently to admit it as evidence. The judgment of the district court is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 678. Filed March 15, 1899.]

[56 Pac. 731.]

CORA E. TRIMBLE et al., Defendants and Appellants, v.
MARY E. LONG, Plaintiff and Appellee.

1. **APPEAL AND ERROR—ASSIGNMENT OF ERROR—NECESSITY FOR—FUNDAMENTAL ERROR—AFFIRMANCE.**—Where there are no assignments of error, and no error appears on the face of the record, the judgment will be affirmed.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

W. R. Stone, Joseph H. Kibbey, and H. D. Cassidy, for Appellants.

J. S. Sniffen, for Appellee.

PER CURIAM.—Mary E. Long brought an action in the district court of Pinal County against Cora E. Trimble and W. H. Halliday to set aside a mortgage and to relieve property from the lien created thereby, alleging that the mortgage had been executed by one M. W. Harter, as the guardian of her estate, while she was a minor, and, having arrived at the age of majority, she had in no wise confirmed the mortgage, but had always repudiated it; that the mortgage was executed without authority of law, and was a cloud upon the title of her land. The defendant Halliday answered, setting up the facts concerning the execution of the mortgage, and asked that the court decree the mortgage as a lien upon the property. The mortgage was executed to defendant Trimble, and by her assigned to defendant Halliday. Defendant Trimble made default. Judgment was rendered by the district court for the plaintiff, Long. Defendant Halliday appealed to the supreme court.

There is no proper transcript of the record, but the clerk of the district court has certified to this court the original complaint, answer, the judgment, and minute entries. There is no statement of facts or bill of exceptions, nor any transcript of the reporter's notes of the evidence, nor is there any assignment of error, in briefs or elsewhere. It is a well-established rule of this court, and has been repeatedly held, that without assignments of error, and no error appearing upon the face of the record, the judgment would be affirmed. There being nothing in the record to show errors at the trial, or in the findings of fact, or in the judgment, the judgment of the district court is affirmed.

[Civil No. 662. Filed March 15, 1899.]

[56 Pac. 871.]

TERESA JORDA DE HEREU, Plaintiff and Appellant, v.
NARCISO HEREU, Defendant and Appellee.

1. MARRIAGE AND DIVORCE—DECREE—VALIDITY—LACK OF PROOF OF SERVICE—APPEARANCE.—This court will not inquire into the validity of a decree of divorce at the suit of the defendant therein attacked on the ground that there was no proof of service as required by statute, where it appears that subsequent to its entry defendant appeared and consented to the entry of an amended decree on condition that it provide that she have a portion of the community property.
2. SAME—SAME—SAME—OPENING UP—COMP. LAWS ARIZ. 1877, PAR. 2504, CONSTRUED.—Under paragraph 2504, *supra*, providing that in all cases where no personal service was had the court may at any time within two years allow the defendant to appear and answer, it is within the power of the court to allow the defendant in a divorce suit to file her answer and to ask to have the judgment corrected so that her rights may be protected.
3. SAME—ACTION FOR DIVORCE—DEFENSE—PRINCIPAL AND AGENT—RATIFICATION OF ACTS—NECESSITY FOR WRITTEN AUTHORITY.—Where a defendant in a suit for divorce appoints an agent with full power to conduct her defense, and is fully aware of every step he takes, and ratifies the same, she is bound by his acts, and the fact that such agent has no written power of attorney is immaterial.
4. SAME—SAME—DECREE—COLLUSION AS TO FACTS—MAY CONSENT AS TO NATURE AND FORM OF DECREE.—While courts will not render decrees of divorce where there is collusion as to the facts, parties in court may consent to the character and nature of the decree.
5. SAME—SAME—SAME—CONSENT TO ENTRY OF AMENDED DECREE.—Where in an action for divorce, service being had by publication, after the hearing of evidence, a decree of divorce is entered, and subsequently thereto the defendant appears and without seeking to have it set aside consents to the entry of an amended decree providing for the payment to her of half of the community property, such amended decree is not a consent decree of divorce, but is a confirmation of the first decree.
6. SAME—SAME—SAME—VACATING—EQUITY—RELIEF AGAINST MISTAKE OF LAW.—When defendant in a divorce suit, with full knowledge of all the facts and circumstances, consents to the entry of a decree of divorce which provides that she shall have one half of the community property, she will not be permitted to maintain an action to set aside the decree on the ground that she was advised

by her counsel that such decree was binding upon her, and that she is now advised otherwise, such mistake being one of law alone.

7. EQUITY—RELIEF AGAINST MISTAKES OF LAW—COMPROMISES.—Equity often relieves against mistakes of law, but under such circumstances that the mistake may be treated as one of fact. But where one, with full knowledge of the material facts, compromises her claims against another and obtains a decree which accomplishes the ends she wishes to effect, she will not be heard to complain that she was mistaken as to the legal effect thereof as to its binding force.
8. SAME—DEFENSES—DELAY.—Delay in pursuing a remedy is not acquiescence; yet mere delay may of itself be a reason for courts of equity to refuse to act, and they generally do refuse where other parties have contracted new engagements as the result of delay.
9. SAME—SAME—ACQUIESCENCE DEFINED.—Acquiescence is mere silence—refusal to speak when one ought to speak for the protection of others, or to act in time to prevent others from doing acts of which the dilatory one afterwards complains.
10. SAME—SAME—CONFIRMATION DEFINED.—Confirmation is a deliberate act—a ratification of a previous transaction known to be avoidable.
11. SAME—SAME—LACHES—ACQUIESCENCE—CONFIRMATION—MARRIAGE AND DIVORCE—VACATING DECREE.—Where defendant consented to the modification of a voidable decree of divorce by which she received one half of the community property, she is estopped by confirmation, also by acquiescence and laches in delaying fifteen years to have the judgment set aside, until in the mean time plaintiff had remarried and a new family had grown up under his protection.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, for Appellant.

Z. A. Zabriskie, Lovell & Satterwhite, and Barnes & Martin, for Appellee.

Plaintiff cannot successfully attack this decree for defects in service of publication, where such defects were known and acquiesced in for fifteen years. *Badger v. Badger*, 2 Wall. 94; *Sullivan v. Railway Co.*, 94 U. S. 807; *Pomeroy's Equity Jurisprudence*, pars. 418, 419.

Laches deprives a plaintiff of the right to appeal to a court of equity, and the court may refuse to entertain a suit brought after unreasonable delay, although defendant has not in his answer alleged that the claim is stale. *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. 966.

STREET, C. J.—1. Appellant and appellee were married in the city of Gerona, Spain, on the twenty-ninth day of October, 1856. Soon thereafter they came to America, and lived a short while in New Orleans, and subsequently in Matamoras, Mexico. Appellant was the wife, and appellee the husband, the full name of whom was Narcisso Hereu de Matas, Matas being the name of his mother. Appellant and appellee lived together, not harmoniously, until about the year 1879, when the wife, appellant herein, returned to New Orleans, and occupied the property which belonged to the community, the title to which was in the name of the husband, Narcisso Hereu de Matas. The issue of the marriage was two children—Rudolph de Matas and Elvira de Matas. In 1880 Narcisso, the father and husband, went to New Orleans to receive medical treatment at a hospital; and, as he was recovering, the son, Rudolph, then about twenty years of age, induced him to go to the house where his mother and sister were living. When the father reached the house, an angry dispute arose, as of old, between the husband and wife. The wife approached him in a conciliatory manner, whereupon he declared that “he had come solely to see the children, and that he was no more a husband to her, nor did he intend to be in the future.” An exciting scene followed, which ended in the mother going to her room, and the father remaining in the room of his son. After staying at the house a few days, he left. Appellee went to Tucson, Arizona, and took up his permanent residence there; the wife remaining in New Orleans in the property to which she moved when she left Matamoras. On the twenty-ninth day of November, 1881, the husband, under the name of Narcisso Hereu, filed his complaint in the district court of Pima County against the wife, Teresa Jorda de Hereu, asking for a decree in divorce, and alleging as a cause that “on or about March 13, 1879, the said defendant, disregarding the solemnity of her marriage vow, at Matamoras, republic of Mexico, where plaintiff and defendant then resided, willfully and without

cause disregarded and abandoned the plaintiff, and ever since has and still continues so to, willfully and without cause, disregard and abandon said plaintiff, and to live separate and apart from him, without any sufficient cause, or any reason, and against his wish," etc. The defendant in that cause being out of the territory and a non-resident, service of summons was had, or attempted to be had, by publication. Under paragraph 2466 of the Compiled Laws of 1877, the probate judge of Pima County made an order for the publication of the summons in the Daily Journal, a newspaper published in Tucson, and further ordered that a copy of the summons and complaint be deposited in the post-office, postpaid, and directed to the defendant at her place of residence in New Orleans, state of Louisiana. The summons was published under said order for fifty-two consecutive days (from the first day of December, 1881, to the twenty-first day of January, 1882, both inclusive) in the Daily Arizona Journal, a newspaper published in Tucson, and for eight successive days (from the twenty-third day of January, 1882, to the thirty-first day of January, 1882, both inclusive) in the Arizona Citizen, likewise a newspaper published in Tucson; and a copy of the summons and complaint was mailed to the defendant therein, by B. H. Hereford, attorney for plaintiff, by depositing it in the post-office at Tucson, postpaid, and directed to the defendant in New Orleans, without any special directions as to residence in said city, so far as shown by the record. Paragraph 2467 provides that the order shall direct the publication to be made in some newspaper, to be designated, as most likely to give notice to the person to be served, the last of which insertions shall be sixty days from the first. The defendant made no answer or appearance, and on the third day of April, 1882, the district court of Pima County, at a regular term thereof, entered a decree of divorce, dissolving the marriage between plaintiff and defendant in said action, and releasing them from the bonds of matrimony, in which decree the court recited that it was done upon the proofs taken in said action, and upon the report of the court commissioner and referee in the cause appointed to take proofs of the facts set forth in the complaint. Thereafter, on the eighteenth day of March, 1883, the divorced husband, Narcisso, married another wife, who is still alive; the issue of said marriage being one daughter,

now eleven or twelve years of age. Upon the fact of that marriage coming to the knowledge of the divorced wife, then still living in New Orleans, she had a conference with her brother, her son, Rudolph, and a nephew, about the recovery of her share in the community property. It is claimed that until the wife heard of the remarriage of the husband she had no knowledge of any divorce proceedings, but then a copy of the decree of divorce was obtained by her nephew, Judge Emilio Forto, and it was translated to her by her son, Rudolph, and her brother, Thomas Forto. The result of the conference was that the son, Rudolph, accompanied by her nephew, went to Tucson, with directions from the wife to enter proceedings against the husband, and to set the decree of divorce aside, unless the son could get a favorable settlement with the father in the interest of the mother for her share of the community property. The son and nephew arrived in Tucson in May, 1883, and at once employed counsel, whom the mother had directed the son to employ, to take such steps as would secure to the mother her property rights. The counsel so employed had a conference with the husband, and afterwards with the husband's counsel, so that, under the direction of the counsel employed by the son, the mother sent a power of attorney to the son, under date of the 31st of May, 1883, which in effect was a power to settle and satisfy any claims existing in the wife's favor against the husband, and, if necessary, to sue upon the same, and to appear to prosecute and defend any actions in law or in equity which in his judgment might seem proper to litigate her claims to a final settlement or compromise, and to employ counsel for that purpose. The appellant says she never signed that power of attorney. Afterwards, on June 23, 1883, the attorneys employed made appearance in the district court in the original case of Narcisso Hereu against Teresa Jorda de Hereu, and stated that they appeared upon the retainer of Rudolph, the attorney in fact for the defendant, and filed their petition for the defendant, setting up the fact of the decree of divorce on the 3d of April, 1882, making allegations that the defendant was ignorant of the pendency of the action; that she had not received a copy of the summons or complaint, and made allegation of the existence of community property, and tendered an amended judgment, to be entered *nunc pro tunc* as of the third day of

April, 1882. The petition was sworn to by the son, Rudolph Matas, and upon the same day the plaintiff in that action, Narcisso Hereu, in person and by his attorneys, filed a paper indorsed "Stipulation and Consent of Plaintiff," wherein he confessed and admitted all of the facts in the petition, and consented to the filing of said amended judgment and decree as asked for, all of which was the result of the negotiations carried on by the son. Whereupon an amended judgment was entered, reciting the fact of the action being commenced on the twenty-ninth day of November, 1881, the affidavit for publication of summons, the issuance of the summons, the publication of the summons, and proofs of its publication, the judgment of the court on the hearing of the cause, the existence of the community property in the sum of ten thousand dollars, and again decreeing as follows: "Now, therefore, it is ordered, adjudged, and decreed that the bonds of matrimony heretofore existing between plaintiff and defendant be, and the same are hereby, absolutely dissolved and set aside, and said plaintiff, Narcisso Hereu, and the defendant, Teresa Jorda de Hereu, are hereby divorced; and it is further ordered, adjudged, and decreed that the said plaintiff, Narcisso Hereu, do pay to the said defendant, Teresa Jorda de Hereu, the sum of five thousand dollars, in full of her share of the community property, and for her separate property; that this judgment and decree be filed and entered *nunc pro tunc* as of the 3d day of April, 1882." Under this decree the husband paid to the son, for the mother, the sum of three thousand dollars in cash, and delivered to him two notes of the denomination of one thousand dollars each; and also, as a result of the negotiations, the husband made, executed, and delivered unto the wife a deed for all of the New Orleans property occupied by her then as a residence, and transferred to her mining stock in the Mammoth Mining Company of Arizona. The son returned home to New Orleans and reported the facts to the mother. Soon thereafter Teresa Jorda de Hereu sold the property which the husband had so deeded to her, and went to Spain, where she remained until 1895, when she returned to New Orleans. In 1897 she came to Tucson, with the avowed purpose of collecting the two promissory notes given by her husband in settlement of the judgment. When she reached there, she was advised that the

proceedings in divorce were a nullity, and thereupon filed a complaint in the district court reciting the history of the two judgments in divorce, in which she alleged: That on the return of her son, Rudolph, to New Orleans, she was apprised that a final decree in divorce had been entered; that Rudolph informed her that such decree was in all things valid and binding; that he had submitted the same to eminent and learned counsel, each of whom had carefully examined the record in said cause, and that each had assured him that the said decree was valid, binding, and final; and that she would be compelled to abide by it; that she, in all things, believed in and relied on the statements so made to her, and because thereof had left the United States and taken up her residence in Spain; and that after her arrival in Pima County, in 1897, she learned for the first time that said decrees of divorcement, and both of them, were each wholly and utterly void. Her complaint was fully answered by appellee, who set up the proceedings in the two decrees, and prayed that they in this action be decreed valid and binding.

2. The question whether the first decree was valid or not may remain unanswered. It is attacked solely upon the ground that there had been no proof of service, such as contemplated by statute. It is not charged that there was any fraud upon the court, nor that the plaintiff was not a citizen and *bona fide* resident of the territory for the proper time; nor is it charged that the facts in the complaint are untrue, but solely that the defendant did not have actual knowledge of the institution of the suit and the pendency of the action asking for a divorce, and that there had not been the technical statutory publication of the summons. Paragraph 2641 of the Compiled Laws of Arizona, then in force, directs: "Immediately after entering the judgment, the clerk shall attach together and file the following papers which shall constitute the judgment-roll: In case the complaint be not answered by the defendant, the summons, with the affidavit of proof of service and the complaint, with a memorandum indorsed on the complaint that the default of the defendant in not answering was entered, and a copy of the judgment." The transcript of the evidence taken in the present case sets out as exhibits all such matters, but we are unable to determine whether they were embodied in the judgment-roll in the original case. The judgment of

the court, however, recites that the default of the defendant was legally entered, and that the referee had taken the testimony by question and answer, and made report of the same to the court, from which it appeared all the material averments of the complaint are sustained by the testimony, free from legal exceptions. It appears from the transcript in this case that the proof of publication of summons showed that it was published in one paper for fifty-two days, and in another paper, not mentioned in the order of the probate judge, for eight days; and it also appears that the summons and a copy of the complaint were mailed to the then defendant in New Orleans, as the statute prescribes. We will accept as a fact that she knew nothing of the proceedings or decree of divorce until she heard of her husband's marriage, nearly a year afterwards. When shown the decree of divorce, she took counsel with her brother, her nephew, and her son, and with a lawyer in New Orleans, as to the feasibility of attacking the judgment and setting it aside, not upon the ground that a fraud had been perpetrated upon the court, or that the facts set forth in the complaint were not true, but upon the ground that there had been no legal service of summons upon her. The question, however, which affected her was one of property, and the evidence is so strong that it makes it convincing that the question of property was uppermost in her mind. It is also convincing that the result of the conferences between her and her relatives and the lawyer in New Orleans was, that if she could get a proper settlement of the property and get her share of the community estate, the judgment in divorce need not be attacked, but that they would attack the judgment if it became necessary to enforce a compromise about the property; and it was with this view that she sent her son, who had then reached the years of majority, as her agent, to Tucson, with full power to do the best he could in getting her share of the community property, and to attack the judgment if it were necessary in effecting a compromise.

3. This brings us to the question of the second decree, which is attacked by her as having been rendered without her authority, and as appearing upon its face a consent judgment in divorce. It has also been attacked because it was opening up a judgment, not at the term at which it was rendered, but after the term had closed and other terms had intervened.

It is a general rule of law that all the judgments, decrees, and other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or of record, and they may be set aside, vacated, modified, or annulled by the court; and it is a rule, equally well established, that after the term is ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them. During a term of the court the judgment is in the breast of the judge. After the term has expired it is committed to the rolls. That rule, however, has some modifications, and especially in divorce proceedings it has not been strictly followed. It was the doctrine and rule of the ecclesiastical courts of England that a sentence or judgment against the validity of a marriage, either annulling a voidable marriage, or declaring that a pretended marriage was absolutely void, was not final, but was forever open to revision and reversal. Paragraph 2504 of the Compiled Laws of Arizona, then in force, prescribes: "When from any cause the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within two years after the rendition of any judgment in such action, to appear and answer to the merits of the original action." Black, in his work on Judgments, says: "There are cases holding that such statutes do not include decrees of divorce." But he says: "Unless such decrees are specifically withdrawn from the general class, it is difficult to see how they can be considered as exceptions to the terms of a statute plainly extending to all judgments, on any right principles of interpretation." 1 Black on Judgments, sec. 320. The case of *Edson v. Edson*, 108 Mass. 590, is a case in point. That was upon a petition asking that a judgment and decree in divorce rendered at a former term be set aside on the ground of fraud. In discussing the question the court say: "We believe it to be an established principle of jurisprudence that courts of justice have power, on due proceedings had, to set aside or vacate their judgments and decrees, when it appears that an innocent party without notice has been aggrieved by a judgment or decree obtained against

him, without his knowledge, by fraud of the other party. . . . It is a petition, addressed to the sound judicial discretion of the court, asking that a decree rendered at a former term may be reopened and vacated on the ground that it was fraudulently obtained. It is in the nature of an application to correct the record and prevent a wrong and injustice from the effect of the judgment as it now stands." Under the statute quoted it was within the power of the district court to allow the defendant in that action to come into court and be permitted to file her petition in the nature of an answer, and ask to have the judgment corrected so that her rights which she set up should be protected.

The defendant insists that she never signed the power of attorney to her son. Whether she did or not makes but little difference; for she clothed him fully with the power which he exercised, by oral directions, and she was fully aware of every step that he was about to take, and after the matter was concluded she was fully informed of everything that had been done, and she expressed her satisfaction with it.

It may be conceded that decrees of divorce cannot be rendered by agreement or by collusion, but only upon regular process, or by appearance to the jurisdiction, and upon proof taken. Courts will not enter decrees of divorce where there is a collusion as to the facts, but where the parties are in court they may consent as to the character and nature of a decree. A decree of court was already on record between these parties, and she asked to come into court to attack it in one particular only, and that was to obtain her share of the community property. She knew all of the circumstances of the decree, such as it was, and could have asked to have had it set aside, had she so chosen; and that question, as we have heretofore said, was repeatedly discussed by her and her relatives, her son, and attorney, in New Orleans, and discussed by her son and the lawyers he employed by her request at Tucson. There was no effort made at that time to set the decree aside, but an effort was made to have it corrected, so as to protect her in the only rights she complained of losing; and for that purpose she filed her petition and tendered an amended judgment. She based her right to have the judgment amended upon the fact that it had been obtained without her knowledge, and it was within the power of her attorneys

employed in the case and attorney in fact, or agent, to consent either that the first decree should stand, or to consent that a decree might then be entered as a ratification of the decree already entered, upon the consideration that she should have a division of the community property. She could not have obtained a judgment for any portion of the community property without the establishment of such a decree. We think it cannot be said that the decree then entered, divorcing plaintiff and defendant, was a consent decree. It was agreed that the decree already in existence should be ratified, and for that purpose a new decree was drafted, having relation to the time when the former decree was entered. Upon the basis of such decree she obtained three thousand dollars cash, two thousand dollars in promissory notes, and, by an agreement accompanying the decree, obtained a deed for the New Orleans property, all of which she received and enjoyed; and, whether the first decree was valid or not, the second was a confirmation of it, and the full establishment of such a decree in divorce as the court had jurisdiction to render.

4. We have been asked by appellant to decide only as to the validity of the first and second decrees; but by appellee, to decide—First, that the misapprehension of appellant as to her rights was a mistake of law, and not of fact; second, that appellant is guilty of such gross laches that a court of equity ought not to grant her relief; and, third, that she was fully aware of the facts, and acquiesced in them, so as to be estopped from denying their binding effect upon her. A mistake is an internal mental condition,—an erroneous conception and conviction which influences the will. It is based on ignorance, and courts of equity indulge in relief against its consequences. There are mistakes of law and mistakes of fact. A mistake of law is an ignorance or error with respect to some general rules applicable to all persons, and is also ignorance or error of the person with respect to his own legal rights and interests. The general rule is, that a mistake of law, pure and simple, is not adequate ground for relief. Where a party, with knowledge of all the material facts, enters into a transaction with an erroneous idea of the rules of law controlling the case, courts of equity will not grant relief. Courts of equity have looked with more leniency upon mistakes of fact, and, where a party is misled as to the existence of a fact, if

the mistake arise without his neglect, courts of equity will grant relief. How stands the situation with reference to appellant's complaint in this action to set aside the decrees which were rendered by the district court in Pima County in 1882 and 1883, and have the divorce declared a nullity? Abundant evidence shows conclusively that during the negotiations by her son in Tucson, and after his return to New Orleans, she was fully advised of every step. She says in her complaint that the whole matter was explained to her, that every step had been submitted to eminent counsel, and that she had been advised that the legal effect of all of those steps was to make a decree which was binding upon her. That declaration carries with it a knowledge of the filing of the complaint in November, 1881; of the attempted publication of the summons; of the mailing of the summons and complaint to her. It also involves a knowledge of her petition, through her attorneys, or her agent in fact, her son, in June, 1883, and its contents, setting out the former decree, setting out the fact that it had been obtained without her knowledge, and that there was community property, and the prayer to have the decree reformed in order to get her share of the community property; also, the answer to that petition by her former husband, consenting to the same, the rewriting of the decree to take effect at the time that the first decree was rendered, the payment of the money by the husband to her agent, the delivery of the deed for the New Orleans property, and the delivery of the two notes for one thousand dollars each, all based upon the entry of the decree in divorce. All of these facts she knew, and was satisfied with the settlement, expressing her satisfaction at the results. She knew the fact that it was the judgment of the lawyers whom her son had consulted in New Orleans that all of these facts worked a binding decree upon her; and the mistake she complains of is the mistake in their judgment, which she relied upon,—a mistake as to the legal effect of these facts, corrected in no other way than by the judgment of other lawyers fifteen years afterwards. We have no hesitancy in saying that her complaint and evidence show that she had a full knowledge of the facts; and if a mistake existed at all, it existed as to her conviction, founded upon the judgment of those who told her of the legal effects.

5. Equity may, and often does, relieve against mistakes of

law, but under such circumstances that the mistake may be treated as a mistake of fact. "Whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relations, either of property or of contract, or personal *status*, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of effecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." 2 Pomeroy's Equity Jurisprudence, sec. 849. But the same author, in the same section, continues: "It should be carefully observed that this rule has no application to cases of compromise, where doubts have arisen as to the rights of parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts." In the next section (850) the author says: "Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all of the parties, instead of ascertaining and enforcing their mutual rights and obligations, which are yet undetermined and uncertain, intentionally put an end to all controversy by a voluntary transaction in the way of a compromise, are highly favored by courts of equity." We have seen that the second decree was a settlement, compromise, and confirmation of the first; and appellant should not be heard to complain that she was mistaken as to the legal effect thereof, as to its binding force, when she was aware of every step that was taken to bring it about, and where the purpose of it was to accomplish ends which she wished to obtain.

6. The other two questions,—viz., "that appellant is guilty of such gross laches that a court of equity ought not to grant relief, and that she was fully aware of the facts, and acquiesced in them, so as to be estopped from denying their binding effect upon her,"—can be considered together as both being in the nature of *quasi* estoppels. Delay in pursuing a remedy is not acquiescence, although it often is strong evidence of acquiescence; yet mere delay—a suffering of time to elapse—may of itself be a reason for courts of equity to refuse to act, and they generally do refuse where other parties have con-

tracted new engagements as the result of delay. Acquiescence is mere silence,—a refusal to speak when one ought to speak for the protection of others, or to act in time to prevent others from doing acts of which the dilatory one afterwards complains. Confirmation is different from either. It is a deliberate act,—a ratification of a previous transaction known to be voidable. Illegal contracts cannot be made good by confirmation, but voidable contracts can be ratified. “If a party originally possessing the remedial right has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfections and of his own rights, or ought, and might with reasonable diligence, have become so aware, and all undue influence is wholly removed, so that he can give a perfectly free covenant, and he acts deliberately, and with the intention of ratifying the voidable transaction, then his confirmation is binding, and his remedial remedy, defensive or affirmative, is destroyed.” 2 Pomeroy’s Equity Jurisprudence, sec. 964. Is not the appellant estopped by confirmation, as well as by acquiescence and laches? She received the award of the judgment, giving her half of the community property, and in addition thereto, as a part of the compromise between herself and appellee, attending the judgment, she received title to all the New Orleans property, and enjoyed the use and possession of that until she sold it for her own individual and separate use and benefit. She is estopped by confirmation and also by acquiescence and laches in delaying to have a judgment of record set aside until a new family had grown up under its protection. The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 648. Filed March 15, 1899.]

[56 Pac. 740.]

JOHN PRINGLE et al., Defendants and Appellants, v.
JOHN G. HALL, Plaintiff and Appellee.

1. PLEADING—JOINDER OF CAUSES—REFORMATION OF CONTRACT—DAMAGES FOR BREACH.—A demurrer to a complaint joining a cause of action for reformation of a contract with one for damages arising from a breach of the contract as reformed is properly overruled, the code procedure not only permitting but encouraging the combination of actions arising out of the same transaction.
2. APPEAL AND ERROR—REVIEW—ERROR IN OVERRULING DEMURRER ELIMINATED BY VERDICT.—Where the jury returned a special verdict finding that all the contract between the parties was contained in an instrument in writing, and no reformation was adjudged and no damages rendered by virtue of any reformation, possible error in overruling a demurrer for misjoinder of a cause of action for reformation of a contract with one for damages for breach of contract as reformed is eliminated.
3. SAME—ASSIGNMENTS OF ERROR—MUST BE SPECIFIC—INSTRUCTIONS.—Where the assignments of error based upon instructions to the jury fail to specifically point out the errors relied upon, and none are apparent to this court, the judgment will be affirmed.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Fletcher M. Doan, Judge. Affirmed.

Statement of facts:—

Appellants and appellee, on the tenth day of March, 1897, entered into a written agreement, in which the appellants, under the name of Pringle Brothers, contracted to deliver to appellee, Hall, five thousand head of cattle for the price of twelve dollars per head, in good shipping condition, at Holbrook, Arizona, as follows: Twenty-five hundred head on the tenth day of May, fifteen hundred head on the first day of June, and one thousand head on the tenth day of September. The cattle were to be good and smooth, and exclude stags, blinds, swaybacks, big-jaws, dwarfs, cripples, and cattle deformed. The purchaser, Hall, gave or paid to Pringle Brothers two dollars per head, or ten thousand dollars, at the time

of making the agreement, as a partial or advance payment on said cattle; and Pringle Brothers agreed to forfeit two dollars per head for a failure on their part to complete their agreement. They delivered, under said contract, 2,945 head of cattle, which were paid for at the time of the delivery at the rate of twelve dollars per head, two dollars per head being included, the amount of deposit—ten thousand dollars—not being fully taken up; and failed to deliver 2,055 head. Hall brought action to recover damages for failure to deliver the 2,055 head under the contract at the stipulated amount of two dollars per head, and also to recover the two dollars per head deposited on the 2,055 head not delivered. He asked in said action for a reformation of the agreement, alleging that the contract, as signed, did not express the entire agreement of the parties, in that it was specially agreed “that the calves of the cows to be delivered that were calved on or after January 1, 1897, were to go with the cows, and not be counted as a part of the five thousand head of cattle; and that such contract was a part of the consideration that induced plaintiff to pay the sum of twelve dollars per head for five thousand head of cattle”; “that it was the intention of the parties that the contract should so express that part of the agreement, but by a mistake of the draftsman who drew the written contract that part of the agreement with reference to the calves born after the first day of January, 1897, was omitted”; and further asked that, after the instrument was so reformed, he be allowed to recover damages for the non-delivery of the calves calved after the first day of January, 1897. The defendants, Pringle Brothers, demurred to the complaint for the reason “that two causes of action are improperly joined together, which are not capable of the same character of relief.” The demurrer was overruled, and the cause was tried to a jury. The special issues were submitted to the jury, the third and fourth of which relate to the completeness of the written contract. The third is: “Did the contract, as signed by the parties, include therein all of the terms of contract for the sale and delivery of cattle as agreed upon by the parties, and as they directed it to be drawn?” to which the jury returned answer, “Yes.” The fourth is: “Was it agreed and understood by the parties to the contract that the calves of the cows delivered that were calved on and after January 1, 1897, were

to be thrown in, and not counted," to which the jury answered, "No." Upon the contract as it stood without being reformed, the jury made such answers to the special issues submitted to them that the court rendered judgment for plaintiff and against defendants, Pringle Brothers, that he recover (1) the sum of \$4,110 of the money advanced, and \$383.50 damages for the use of the same; (2) \$4,110 liquidated damages for the failure to deliver 2,055 head of cattle; (3) \$500 damages for cattle delivered not in good condition; (4) and the court further adjudged that the defendants recover from plaintiff the sum of \$185 damages on account of plaintiff refusing to accept thirty-seven head of cattle of the kind and condition specified in the contract,—making a total judgment in favor of plaintiff in the sum of \$8,918.50.

E. J. Edwards, P. T. Robertson, and J. S. Sniffen, for Appellants.

The demurrer to the complaint ought to have been sustained. Two causes of action were improperly joined and united together which were not capable of the same character of relief. One was to reform a contract, and purely equitable in its nature, and the other was for damages for a breach of the contract as reformed, and simply an action at law. *Tit. XV, sec. 22, par. 670, Rev. Stats. Arizona; Harrison v. Juneau Bank*, 17 Wis. 350; *Gunn v. Madigan*, 28 Wis. 158; *Pomeroy on Remedies and Remedial Rights*, sec. 459.

Moorman & McFarland, and George J. Stoneman, for Appellee.

Different modes of relief do not make different causes of action. Where a contract is both reformed and enforced the relief may be called double,—first, the correction of the mistake, and, second, the damages for the breach. *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 357, 69 Am. Dec. 707, and note; *Cahoon v. Bank of Utica*, 7 N. Y. 486.

The supreme court of California in discussing this question says: "A complaint stating the facts, and praying that a deed be declared a mortgage and the title to the land be quieted, does not join two causes of action. . . . One cause of action is alleged, but two modes of relief." *Louvall v. Grid-*

ley, 70 Cal. 507, 11 Pac. 777; *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82; *McClurg v. Phillips*, 49 Mo. 315.

This question is settled by the decision of the supreme court of the United States in *Ely v. New Mexico etc. R. R. Co.*, 129 U. S. 291, 9 Sup. Ct. 293, reversing the supreme court of this territory. See, also, *Hornbuckle v. Toombs*, 85 U. S. 291; *Hirshfield v. Griffith*, 18 Wall. 657; *Davis v. Bilsland*, 18 Wall. 659; *Henderson v. Dickey*, 50 Mo. 151; *Paddock v. Somes*, 102 Mo. 226, 14 S. W. 746; *Blair v. Chicago etc. R. R. Co.*, 89 Mo. 383, 1 S. W. 350; *McHoney v. German Ins. Co.*, 44 Mo. 426; *Ware v. Johnson*, 55 Mo. 500; *Gormley v. Potter*, 29 Ohio St. 597; *Moore v. Ogden*, 35 Ohio St. 434; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Stock Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444; *Pfister v. Darcy*, 65 Cal. 403, 4 Pac. 393; *Giant Powder Co. v. San Diego F. F. Co.*, 78 Cal. 193, 20 Pac. 419; *Barley v. Dale*, 71 Cal. 34, 11 Pac. 404; *Jacob v. Lorens*, 98 Cal. 332, 32 Pac. 119; *Gates v. Kieff*, 7 Cal. 124; *Waterson v. Saldunbehere*, 101 Cal. 107, 35 Pac. 432; *Morehout v. Higuerra*, 32 Cal. 289; *Tompkins v. Sprout*, 55 Cal. 31; *Hutchins v. Ainsworth*, 63 Cal. 286; *Gallman v. Perry*, 47 Miss. 146; *Orendorf v. Budlong*, 12 Fed. 24; *Kahn v. Kahn*, 15 Fla. 400; *Montgomery v. McEwen*, 7 Minn. 351; *St. Paul etc. R. R. Co. v. Rice*, 25 Minn. 278; *Nichols v. Randall*, 5 Minn. 304; *Turner v. Althaus*, 6 Neb. 55; *Wineland v. Cochran*, 9 Neb. 484, 4 N. W. 67; *Keeres v. Gaslin*, 24 Neb. 310, 38 N. W. 797; *Stewart v. Carter*, 4 Neb. 564; *New York Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357; *Davis v. Morris*, 36 N. Y. 569; *Latlin v. McCarty*, 41 N. Y. 107; *Bockes v. Lansing*, 74 N. Y. 437; *F. and M. National Bank v. Rogers*, 17 N. Y. St. 381, 1 N. Y. Supp. 757; *Sternberger v. McGovern*, 56 N. Y. 12; *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430; *O'Sullivan v. New York etc. R. R. Co.*, 25 N. Y. St. 903, 7 N. Y. Supp. 51; *Robinson v. Smith*, 53 Hun, 638, 7 N. Y. Supp. 38; *Quarl v. Abbott*, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; *Frank v. Keesler*, 30 Ind. 8; *Brown v. State*, 121 Ind. 235, 23 N. E. 75; *Fite v. Pringle*, 132 Ind. 312, 21 N. E. 1054; *Rigsbee v. Trees*, 21 Ind. 225; *J. L. Roper Lumber Co. v. Wallace*, 93 N. C. 22; *Burton v. Collins*, 118 N. C. 196, 24 S. E. 122; *Dawson Bank v. Harris*, 84 N. C. 206; *England v. Garner*, 86 N. E. 366; *People v. Met. Tel. Co.*, 31 Hun, 598;

Scarborough v. Smith, 18 Kan. 399; *Johnson v. Stratton*, 6 Tex. Civ. App. 431, 25 S. W. 688; *Lyon-Thomas Hd. Co. v. Perry S. Mfg. Co.*, 88 Tex. 468, 27 S. W. 100; *Cassaday v. Waco Tap. R. Co.*, 78 Tex. 131, 10 S. W. 543; *Stock Growers' Bank v. Martin*, 13 Colo. 245, 22 Pac. 444; *Vail v. Hammond*, 60 Conn. 374, 25 Am. St. Rep. 330, 22 Atl. 954; *Butler v. Barnes*, 60 Conn. 170, 21 Atl. 419; *McKinnis v. Freeman*, 48 Iowa, 364; *Stapleton v. King*, 40 Iowa, 278; *United States v. Williams*, 6 Mont. 379, 12 Pac. 851; *Brewer v. McCain*, 21 Colo. 382, 41 Pac. 822; *Edde v. Pashpah-o*, 5 Kan. App. 115, 48 Pac. 844; *American Savings etc. Assn. v. Burghardt*, 19 Mont. 323, 61 Am. St. Rep. 507, 48 Pac. 391; *Thomas v. Thomas*, 41 N. Y. 503; *Threatt v. Brewer Min. Co.*, 49 S. C. 95, 26 S. E. 970; *State v. Parsons*, 147 Ind. 579, 62 Am. St. Rep. 430, 47 N. E. 17; *Swanson v. Kirby*, 98 Ga. 586, 26 S. E. 71; *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635; *Ingram v. Abbott*, 14 Tex. Civ. App. 583, 38 S. W. 626; *Vermont L. and T. Co. v. McGregor*, 5 Idaho, 320, 51 Pac. 102; *Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761; *Dykman v. Keeney*, 47 N. Y. 352.

STREET, C. J. (after stating the facts.)—1. As to the demurrer to the complaint that causes of action were united which required separate and different relief, one legal and the other equitable: Before the adoption of the reform procedure now existing in so many states, it was the rule that application would have to be made to a court of equity to reform the instrument, and then, as it was reformed, a court of law could administer the remedy. It is now well settled by a number of states, and by decisions from the United States supreme court on causes appealed to it from the territories, of which our territory has furnished examples, that such causes of action can be united. Pomeroy, in his work on Remedies and Remedial Rights (par. 76), says: "The new system not only permits, but encourages, such a union and combination; for one of its elementary notions is that all the possible disputes or controversies arising out of or connected with the same subject-matter or transaction should be settled in a single judicial action." In paragraph 77 he gives a classification of the combinations that may be made. The possible modes or forms of the union or combination by the plaintiff of legal

and equitable primary rights and remedies in one suit are the following: 1. Both a legal and equitable cause of action may be alleged, and both a legal and equitable remedy obtained; 2. Both legal and equitable causes of action may be alleged, and the single remedy obtained may be legal or equitable; 3. Upon an equitable cause of action—that is, an equitable primary right alleged to have been invaded—a legal remedy may be obtained; 4. Upon a legal cause of action—that is, a legal primary right alleged to have been invaded—an equitable remedy may be obtained; and 5. In an action purely legal—that is, where the primary rights asserted to have been invaded and the remedy demanded are both legal—the plaintiff may invoke an equitable right or title in aid of his contention, and obtain his remedy by its means. The defendants' demurrer was properly overruled. In any event, the question is eliminated from the judgment by reason of the special findings of the jury that all the contract between the parties was contained in their instrument of writing. No reformation of the written agreement was adjudged, and no damages rendered by virtue of any reformation.

2. Appellants have made many assignments of error in regard to the instructions of the court and the findings of the jury. Neither in appellants' brief nor in their oral argument have they undertaken to specifically point out any misdirections to the jury by reason of the instructions given at the request of appellee, or upon the court's own motion, or error by reason of refusing to give instructions offered by appellants. Consequently, in our view of the instructions, we have not been able to discover wherein the jury were misdirected, or wherein they should have received a direction offered and refused. In examining the evidence, we are unable to agree with appellants that the findings of the jury are unsupported by the evidence, or even contrary to the weight of evidence. We find no error in the admission or rejection of evidence. The judgment of the district court is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 654. Filed March 15, 1899.]

[56 Pac. 725.]

A. L. JOHNS, Plaintiff and Plaintiff in Error, v. THE PHOENIX NATIONAL BANK, Defendant and Defendant in Error.

- 1. APPEAL AND ERROR—MOTION TO DISMISS—FAILURE TO FILE PAPERS—NOT JURISDICTIONAL—TIME MAY BE EXTENDED ON GOOD CAUSE SHOWN.**—A motion to dismiss a writ of error, on the ground that no abstract of the record had been filed on the first day of the term, or at all, relates to a rule of court as to the time of filing papers, which can be extended, when good reason is shown, to accommodate delinquent parties, that justice may be done.
- 2. SAME—JURISDICTION—SUMMONS IN ERROR—DIRECTED TO SHERIFF—INSUFFICIENT—REV. STATS. ARIZ. 1887, PAR. 856, CONSTRUED—CADMAN v. OLD DOMINION COPPER COMPANY, 4 ARIZ. 413, FOLLOWED.**—In suing out a writ of error, a summons directed to the sheriff, requiring him to summon the defendant in error, is not a compliance with paragraph 856, *supra*, providing it shall "require the defendant in error to appear and defend such writ before the supreme court at the next term thereof," and insufficient to give this court jurisdiction. *Cadman v. Old Dominion Copper Co.*, *supra*, followed.
- 3. SAME—JUDGMENT—AFFIRMANCE—FAILURE TO FILE TRANSCRIPT OF RECORD—REV. STATS. ARIZ. 1887, PAR. 939, CONSTRUED—PREVENTS FURTHER REVIEW BY APPEAL OR WRIT OF ERROR.**—An affirmance of judgment, under paragraph 939, *supra*, providing therefor upon failure of appellant to file the transcript of the record, is such a termination of the case as ends all proceedings for review, either by appeal or writ of error.
- 4. SAME—SAME—DISMISSAL—FAILURE TO FILE BOND—REV. STATS. ARIZ. 1887, PARS. 849, 851, 937, CITED AND CONSTRUED—FINAL—PRECLUDES SUBSEQUENT PROSECUTION OF WRIT OF ERROR.**—Paragraph 849, *supra*, provides that an appeal may be taken during the term of court at which final judgment is rendered by giving notice of appeal in open court and by filing with the clerk an appeal-bond within twenty days of the end of the term. Paragraph 851, *supra*, provides that a writ of error may be sued out at any time within one year after final judgment is rendered. Paragraph 937, *supra*, provides the matters essential to the prosecution of an appeal, and that in the absence thereof the case shall be dismissed. Where plaintiff in error had a year before filed an appeal, and upon proceedings for justification of sureties upon his appeal-bond was ordered to give an additional bond, but, disregarding the order,

permitted his appeal to be dismissed for failure to comply with said order, and suffered a mandate to be returned to the district court, such dismissal will be held to be final and to preclude the subsequent prosecution of a writ of error.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. **A. C. Baker, Judge. Dismissed.**

The facts are stated in the opinion.

A. J. Daggs, for Plaintiff in Error.

L. H. Chalmers, for Defendant in Error.

STREET, C. J.—1. On October 31, 1896, **A. L. Johns**, the plaintiff in error in this court, as plaintiff in the district court, filed a complaint against the defendant, the **Phoenix National Bank**, a corporation, seeking to recover \$25,654.39 damages for the conversion of certain choses in action, and alleges: That the **Bank of Tempe**, being the owner of several promissory notes aggregating the sum of \$17,953.51, principal and interest, did, on the — day of March, 1894, pledge the said notes to the said **Phoenix National Bank** as collateral security to secure the payment of an overdraft then due and of overdraft privileges. The first of said notes was for the sum of one thousand dollars, signed by **Robert Bowen** and **W. A. Daggs**; the second for three thousand dollars, signed by **A. J. Daggs**, and indorsed by **R. E. Daggs**; the third for seven thousand dollars, signed by **A. J. Daggs**, and indorsed by **R. E. Daggs**; the fourth for five thousand dollars, signed by **A. J. Daggs**, and indorsed by **R. E. Daggs**; the fifth and sixth each being for four hundred dollars, and signed by **H. Z. Zuck**. That on the twenty-third day of May the **Bank of Tempe** made a general assignment for the benefit of creditors to **D. A. Abrams**, who thereupon became the assignee in bankruptcy of said **Bank of Tempe**; that thereafter on the twenty-eighth day of November, 1894, the **Phoenix National Bank** unlawfully sold, assigned, and delivered the notes to **A. J. Daggs**, the maker of a portion thereof, and that thereafter, on the ninth day of March, 1895, said **Abrams**, assignee of the **Bank of Tempe**, sold and assigned to said **A. J. Daggs** all of the right, title, and interest of said **Bank of Tempe** “in and to that

certain chose in action of conversion, and all right in action against the defendant growing out of the sale and conversion by the defendant of the notes described, and all right to recover damages arising out of such sale and conversion," etc., by reason of such sale to A. J. Daggs; that thereafter, and on the seventh day of April, 1895, said A. J. Daggs sold and assigned to the plaintiff, A. L. Johns, all his right to recover from the defendant damages arising from the sale and delivery of the promissory notes by the Phoenix National Bank to the said A. J. Daggs; that afterwards the said A. J. Daggs, who is attorney for plaintiff, and who was the principal debtor on the greater part of the obligations, and who received the assignment of the notes from the Phoenix National Bank, and who received the right to damages in the chose in action from Abrams, assignee, because of such assignment, and who afterwards transferred his right of action to Johns, plaintiff, made a demand on the defendant, the Phoenix National Bank, for the payment and settlement of the damages complained of. On June 9, 1897, the cause was tried to the court without a jury, and, upon the evidence offered by the plaintiff, judgment was rendered for the defendant, whereupon plaintiff filed a motion for a new trial, which, on June 18, 1897, was heard by the court, and denied, and plaintiff gave notice of appeal to the supreme court of the territory. These proceedings were in the May term of the district court, 1897, which term adjourned *sine die* on November 20th of that year. On December 4th of that year plaintiff filed an appeal-bond with the clerk of the district court, with the London Company, a corporation, as surety, signed by R. E. Daggs, as secretary of the London Company, and by the plaintiff, A. L. Johns, by A. J. Daggs, his attorney, which was by said clerk approved. The defendant, on December 6, 1897, excepted to the bond and to the sufficiency of the sureties. The justification of sureties coming before the court for adjudication, the court, on December 31, 1897, entered an order disapproving the bond and the sureties thereon, and permitted the appellant to file a new bond, with sureties, by January 8, 1898. No new or further bond on appeal was ever filed, but on January 7, 1898, the plaintiff filed his appeal in the supreme court of the territory for the January term, 1898, the first day of which began on the 10th of January, 1898; whereupon defendant (appellee)

moved that the appeal be dismissed, on the ground: 1. "That no appeal-bond in this case has ever been approved by the district court of Maricopa County, or the clerk thereof, from which said court this said appeal comes, or by any other person having authority to approve said bond; and the only bond on appeal presented by appellant for approval was disapproved by the said district court, as shown by the minute orders of said court, and certified to, a copy of which is hereto attached; and therefore this court is without jurisdiction in this case." 2. "Because of that disapproval the said bond is not an appealable order, and therefore this court has no jurisdiction in this case." 3. "That the appellant herein has not served upon the attorneys for appellee a copy of his brief in said cause within thirty days after his attempt to perfect his appeal herein, in accordance with subdivision 5 of rule III (2 Ariz. xxxiii, 35 Pac. vi) of the court, or at all." 4. "For the reason there is no bill of exceptions or statement of facts filed in this cause." And 5. "That the statement or record filed herein does not comply with law." Appellant based his motion upon certificates of the clerk of the district court, and upon the record and papers on file in the supreme court. The motion to dismiss was, on the eighteenth day of January, 1898, sustained, and the then appeal of the present plaintiff in error was dismissed. *Ante*, p. 181. On February 9, 1898, a mandate issued out of the supreme court to the district court, which, together with all of the original papers theretofore transmitted by the district court to the supreme court, were returned to the district court, the attempted appeal having been made under act No. 71 of the nineteenth legislative assembly, without the aid of a bill of exceptions or statement of facts, but upon the original papers and the transcript of the reporter's notes of the trial.

The plaintiff next, on the eleventh day of February, 1898, filed his petition in error and his bond on proceedings in error with the clerk of the district court, and obtained from the clerk of said court a summons in error of that date, which is in form and words as follows, to wit: "Summons in Error. In the name of the territory of Arizona, to L. H. Orme (sheriff) or any constable of Maricopa County, greeting: You are hereby commanded to summons the Phoenix National Bank, a corporation, with principal place of business at Phoenix,

Maricopa County, Arizona, to be and appear before our supreme court at the next regular meeting thereof to be held at the city of Phoenix, Maricopa County, Arizona, being on the second Monday in January, 1899, and then and there defend a writ of error granted on petition of A. L. Johns therein against the Phoenix National Bank, as defendant in error therein," etc. The plaintiff then attached the petition in error and the summons in error to the identical papers which he had filed in the supreme court on January 7, 1898, on appeal, and put another cover thereon, and filed it with the clerk of the supreme court on January 6, 1899, for the January term of 1899, entitling it "A. L. Johns, Plaintiff in Error, against The Phoenix National Bank, Defendant in Error"; whereupon the defendant in error appeared especially for the purpose of moving to dismiss the proceedings in error, and filed his motion to dismiss, which is as follows, to wit: "Comes now defendant in error, and moves the court to quash the citation in error, and dismiss this cause in this court, for the following reasons: (1) Because no summons in error was issued or served in said cause, as provided by paragraph 856 of the Revised Statutes of Arizona, but, instead thereof, a citation only was issued and served upon defendants in error. (2) Because no abstract of the record in this cause had been filed herein on the first day of the term of this court, or at all. (3) Because this cause was brought to this court by appeal at the January term, 1898, of this court, and said appeal was dismissed by this court, without any reservation of right to the parties; and a mandate issued out of this court on the ninth day of February, 1898, dismissing said appeal and giving appellee judgment."

2. Of the three reasons assigned by the defendant in error why the court, at this term, should dismiss the writ of error, as it did at the last term dismiss the appeal, the second relates to a rule of court as to time of filing papers, which can be extended, when good reason is shown, to accommodate delinquent parties, that justice may be done. The first and third are of a different nature, being jurisdictional. The question raised by the first—as to whether a proper summons had been issued and served upon the defendant in error—is not now an open question. This court, at the special July term, 1895, in the case of *Annie Cadman v. Old Dominion*

Copper Co., 4 Ariz. 413, decided that a summons directed to the sheriff, requiring him to summons the defendant in error, was not a compliance with the statute. There was no opinion written in that case, hence we will take a short review of the situation. Where the statute prescribes a certain thing to be done in taking out a writ of error, a party cannot interpose his own peculiar methods in suing out a writ of error, instead of following the statute. It is essential that writs should be framed with regard to the provisions of the statute. Paragraph 855 of the Revised Statutes provides that upon the filing of a petition and bond it shall be the duty of the clerk to issue forthwith a summons for the defendant in error. There has been some argument by counsel as to the distinction between summons and citation. A summons is "the name of a writ commanding the sheriff or other authorized officer to notify a party to appear in court to answer a complaint made against him, and in said writ specified, on a day therein mentioned." A citation is "a writ issued out of a court of competent jurisdiction, commanding the person therein named to appear on the day named, and do something therein mentioned, or show cause why he should not." It has been argued by counsel that when the statute directs a summons to be issued it means a common-law summons, and that the summons shall be directed to an officer, commanding him to summon the defendant, etc. The ancient distinction between a summons and a citation cannot, under our system, be determinative of the form to be employed. Each jurisdiction determines that matter for itself. We find courts defining a citation to be different from that by which it was known. Some courts say a citation is a writ to be directed to some officer, and must be served by him. This question must be determined by our statute, and paragraph 856 says: "Such summons must be styled, dated, and listed [tested] by the clerk as other writs, and the date of its issuance shall be noted thereon"; and, after containing other provisions, it says: It shall "require the defendant in error to appear and defend such writ before the supreme court at the next term thereof." It is in conformity with the provisions of paragraph 695, providing for summons in the commencement of actions, which there says: "The summons shall state the parties to the action, the court in which it is brought, the county in which the complaint is filed, and

require the defendant to appear and answer the complaint," etc. Each of those provisions are explicit as to how the summons shall be directed. The direction is to the parties defendant, not a direction to the sheriff or other officer, to summons the defendant. In some special proceedings the statute is different; as, for instance, in forcible entry and detainer (Rev. Stats., par. 2010), the direction to the tribunal issuing the summons is: "He shall immediately issue his summons to the sheriff, or any constable of his county, commanding him to summon the person against whom the complaint is made to appear," etc. Again, under act No. 52 of the Laws of 1893, being special proceedings in appeals and writs of error, it is provided the summons mentioned shall "be issued by the clerk of the supreme court to the sheriff of any county in which the defendant in error or his attorney of record may be." This writ of error is not sued out under the provisions of that statute, but under the provisions of title 15, chapter 20 of the Revised Statutes, and must be controlled by the provisions thereof.

3. The third ground urged by the defendant in error why the writ of error should be dismissed was decided in the same case of *Annie Cadman v. Old Dominion Copper Co.*, 5 Ariz. 103. In that case the appeal had been taken and dismissed; afterwards a writ of error had been obtained, and because of the defect in the writ which we have just noticed the writ was dismissed; and afterwards a writ of error in proper form was obtained. At the January term, 1896, the second writ was dismissed, the court, presumably from the record, holding that the dismissal of the first writ of error was such a judgment in the case that no further proceedings in error or on appeal could be had. No opinion having been filed by the court in that case, let us take another short review of the law in relation to such matters. It is provided by paragraph 849 of the Revised Statutes that an appeal may be taken during the term of court at which final judgment is rendered by appellants giving notice of appeal in open court, and by filing with the clerk an appeal-bond within twenty days after the expiration of the term. Paragraph 851 provides that a writ of error may be sued out at any time within one year after final judgment was rendered. The rule in such cases is, where the dismissal of an appeal is for want of prosecution, or the dismissal is on

the merits, that the dismissal will operate as a final judgment, but where an appeal has been dismissed from some technical defect it cannot operate as a final judgment. This plaintiff in error had filed an appeal at the January term, 1898. He had filed his appeal-bond with the clerk of the district court, and had had the same approved, but upon proceedings for the justification of sureties the court had ordered the appellant to give a new or additional bond, and had extended the time in which the same should be obtained up to within three days before the sitting of the supreme court; but appellant, disregarding the same, filed his appeal in the supreme court four days before the sitting thereof, which appeal was dismissed by the court on motion of appellee, because of his failure to comply with the order of the district court in filing a new or additional bond. Paragraph 937 of the Revised Statutes (in proceedings in civil cases in the supreme court) specifies certain things to be done by the parties appealing, and provides that "in the absence of all these" the case shall be dismissed; the things provided being essential to the prosecution of the appeal. Paragraph 939 provides that in failure to prosecute in certain other ways—that is, by filing a transcript of the record—it shall be the duty of the supreme court, on motion, to affirm the judgment of the court below. At the January term the appellee moved to dismiss instead of moving to affirm. Had there been an order of affirmance, there could have been no doubt about there having been such a termination of the case as to have ended all proceedings for review, either by appeal or by writ of error; and the question is whether an order dismissing the appeal, under the circumstances and condition of the record, would operate in the same way. *Perez v. Garza*, 52 Tex. 571-574, is a case where appellant abandoned his appeal the day on which he should have filed a transcript of record in the supreme court, and, instead of filing the transcript, he abandoned his appeal, and filed a petition for a writ of error, and gave the writ of error bond. The court said: "The right of appellee to the execution of his judgment cannot be delayed or trifled with by so shallow a device as this. It is the fact that appellants, after delaying the collection of judgments, might decline to prosecute their appeals, that induced the enactment of the statute which authorizes the affirmance of judgment on certificate, without reference to the

merits. If this could be prevented by abandoning the appeal, and suing out a writ of error at a day too late for the return of the writ to the ensuing term of the supreme court, it would be impossible to enforce judgments against defendants who wish to delay them until the expiration of the term within which a writ of error may be prosecuted; for, if the first writ of error did not effect this, it might be abandoned, as the appeal has been in this case, and another writ sued out." In *Knox v. Earbee*, (Tex. Civ. App.) 31 S. W. 531, the appellant failed to file a transcript in the supreme court within the time prescribed by the statute, and a motion was made to affirm the judgment, whereupon the appellant sued out a writ of error. The court in that case said: "Appellants have failed to excuse their failure to prosecute their appeal, and to allow them to prosecute their writ of error would delay the case several months in this court. We therefore conclude that the answer to the motion to affirm on certificate is insufficient, and the said motion will be granted." In this case the plaintiff in error, by his proceedings in appeal, delayed the settlement of the litigation by his process of appeal up until the very sitting of the supreme court, and then abandoned the appeal, and permitted it to be dismissed, and suffered a mandate to be returned to the district court. Immediately upon the mandate arriving there, when execution upon it could have been enforced, he stayed the execution by a writ of error, and comes again into the supreme court by filing his record therein nearly one year after the writ of error had been issued, and just as the term of the supreme court was about to open, and files the very same papers that he had theretofore filed on appeal, and asks that the same questions be determined which he had failed to prosecute one year before. Under such conditions we feel that it would be trifling with justice to hold that the dismissal of the appeal was not a final determination of the matter, and allow the writ of error to be prosecuted. Therefore, for this reason, and for the reason that a proper summons has not been issued, the writ of error is dismissed.

Sloan, J., Doan, J., and Davis, J., concur.

[Criminal No. 131. Filed March 15, 1899.]

[56 Pac. 718.]

ROBERT MEARA, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—APPEAL AND ERROR—LAWS 1897, ACT NO. 71, RELATES ONLY TO CIVIL APPEALS—CRIMINAL APPEALS—NECESSITY FOR BILL OF EXCEPTIONS OR STATEMENT OF FACTS—PARKER v. TERRITORY, 5 ARIZ. 283, FOLLOWED.—The statute, *supra*, has relation only to appeals in civil cases. In appeals in criminal cases errors outside of the record proper must be set out in a bill of exceptions or statement of facts, and the assignments of error being such as would have to so appear, we cannot examine into them.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Mohave. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

E. M. Sanford, and J. C. Herndon, for Appellant.

C. F. Ainsworth, Attorney-General, and E. E. Ellinwood, for Respondent.

STREET, C. J.—The appellant, Robert Meara, was convicted in the district court of the fourth judicial district of the territory of Arizona, held in and for the county of Mohave, on October 27, 1898, of the crime of grand larceny. He thereafter duly made a motion for a new trial, which was denied by the court, to which ruling he took exception. He was thereupon sentenced to imprisonment in the territorial prison. Appellant makes his assignment of errors as follows, to wit: "(1) The court erred in permitting the plaintiff to read in evidence the certificate, plaintiff's Exhibit No. 1, for the reason that the indictment charges the property to be that of J. P. Finegan and Martha J. Finegan, whereas the certificate describes the property of J. P. and Martha J. Finegan. (2) The court erred in refusing the motion of defendant to strike out the evidence of the certificate of the live-stock sanitary board, No. 1442, for the reason that the brand is not charged

in the indictment to be a 25 connected brand. (3) The court erred, on cross-examination, in sustaining the objection of plaintiff's counsel to the question put to the witness Finegan, as follows: 'Have you been employing any counsel to assist in the prosecution of this case?' (4) The court erred in sustaining the objection of plaintiff's counsel to the answering of the question put to the witness Finegan upon cross-examination, as follows: 'Any kind of fees?' (5) The court erred in sustaining the objection of plaintiff's counsel to the question put by the defendant to witness Finegan as follows: 'Have you advanced, or promised to advance, any moneys to any one on account of any expenses in the prosecution of the defense in this case; that is, the prosecution of the defendant in this case?' (6) The verdict is not sustained by the evidence. (7) The verdict is contrary to law."

He asks the supreme court to investigate these assignments of error on an appeal taken by him under act No. 71 of the nineteenth legislative assembly of the territory of Arizona, and for that purpose has had certified and transmitted to this court the original papers and a transcript of the reporter's notes taken on the trial without any bills of exception or statement of facts accompanying the same, as prescribed by paragraph 1870 of the Penal Code of Arizona. This court, at the January term, 1898, in the case of *Parker v. Territory*, reported in 5 Ariz. 283, 52 Pac. 361, expressly held that the act above mentioned has relation only to appeals in civil cases. We there said: "By a careful reading of that act it will be observed that it was not the intention of the legislature to make the same applicable to appeals in criminal prosecutions. It provides for appeals and writs of error, and speaks of 'plaintiff in error' and of 'appellees,' neither of which terms is used in the statute designating the parties in criminal appeals, but are terms used in the statutes with reference to civil appeals. In criminal appeals, the parties are designated as 'appellant' and 'respondent,' and no provision is made for writs of error. That act dispenses with bills of exceptions. Criminal appeals are heard upon bills of exceptions and statements of fact. The provisions of that act can be made applicable to civil appeals, but cannot be made applicable to criminal appeals, without further or additional legislation upon the subject." The case of *Parker v. Territory*, being the

first case considered by the supreme court in relation to the application of act No. 71 to appeals in criminal cases after the passage of that act, and appellant having been convicted and sentenced to death, the court made an exception of that case, and examined into every portion of the record as filed, and into every assignment of error, as best it could, without the aid of a bill of exceptions or statement of facts. This court having, in the case of *Parker v. Territory*, passed upon the application of act No. 71 of the nineteenth legislative assembly to appeals in criminal prosecutions, and having decided that errors outside of the record proper must be set out in a bill of exceptions or statement of facts, and the assignments of error in this case being such as would have to so appear, we cannot examine into them. The leniency extended to that case cannot be extended to this. We have examined into the record proper, as required by paragraph 1880 of the Penal Code, and find no error therein.

Counsel have sought, in their brief and oral argument, to obtain a reconsideration of the holding in the case of *Parker v. Territory*, and have the rule there announced reversed. We have given consideration to their briefs, and, at their request, have made a review of the appeal law, as prescribed in the Revised Statutes for causes on civil appeals, and in the Penal Code on criminal appeals, in relation to act No. 71, and we see no reason for changing our views in reference thereto, or modifying or reversing the rule in the *Parker* case. The judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 663. Filed March 15, 1899.]

[56 Pac. 741.]

B. F. THOMPSON, Plaintiff and Appellant, v. D. M. FERRY
et al., Defendants and Appellees.

1. TENANCY IN COMMON—CONVEYANCE OF WHOLE ESTATE BY ONE CO-TENANT—ENTRY UNDER DEED CLAIMING WHOLE—COLOR OF TITLE—ADVERSE POSSESSION—STATUTE OF LIMITATIONS.—A conveyance by

one cotenant, purporting to convey an estate in severalty, constitutes color of title, and entry, under the deed, claiming an interest coextensive with that with which the deed purports to deal, is an entry under color of title. The cotenants are therefore bound to take notice of the deed and of the entry made under it, and to take such steps as may be required to enforce a recognition of their rights. Should they fail to do so within the time prescribed by the statute of limitations, their rights will be no longer susceptible of enforcement, and their interests, by operation of that statute, will vest in the party in possession under the deed.

2. ~~SAME—SAME—SAME—SAME—SAME~~—REV. STATS. ARIZ. 1887, PAR. 2299, CITED.—Where a patentee of mining ground, whose possession, under color of title, has ever been adverse to his cotenant, sells and conveys the same, and grantees remain in the open, notorious, exclusive, peaceable, and adverse possession thereof for five years prior to the commencement of a suit in equity, by said cotenant, to have the grantees declared trustees for his interest therein and that they be decreed to convey it, is barred by the statute of limitations, *supra*.

3. ~~SAME—SAME—SAME—SAME—SAME~~—LACHES.—In 1883, Collins was cotenant in the Poland Mine. He mortgaged his interest. When the mortgage became due it was foreclosed. The cotenants were made parties, not as cotenants, but it was alleged that they claimed some interest subordinate to plaintiff, which allegation was found true by the decree. All were served and defaulted, and the mine was bought in by the mortgagor under the foreclosure sale. After his death, his administrator conveyed the mine to Dickey, who went into possession, relocated the claims, secured patents thereto, and conveyed them by divers mesne conveyances to defendants. After defendants and their grantors had been in possession for nearly ten years, paying taxes, and expending over thirty thousand dollars in development work, of all of which plaintiff, one of the Collins cotenants, was aware, he brought suit to enforce his interest as such cotenant. Under the equitable doctrine of laches, plaintiff is estopped from now asserting that he is a cotenant, and that defendants are trustees of the title for his use.

AFFIRMED, 180 U. S. 484; 45 L. Ed. 633.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. J. J. Hawkins, Judge. Affirmed.

Statement of facts:—

On the twenty-fifth day of October, 1883, M. E. Collins was the owner of an undivided one-half interest in the Poland mining claim and an undivided one-half interest in the Hamilton

mining claim, both situated in the Big Bug Mining District, Yavapai County, Arizona. On that day he executed a mortgage to John M. Roberts to secure a debt to Roberts. At that time Charles C. Lane and John Howell were the owners of the other half interest, each owning an undivided one fourth. On the 14th of November, 1883, Lane conveyed by deed his one-fourth interest in the two claims to Collins, and on the same date Collins conveyed that undivided one fourth to Robert Scofield. On November 16, 1883, John Howell conveyed his undivided one-fourth interest to M. E. Collins, and on August 16, 1884, Collins conveyed an undivided one-fourth interest to B. F. Thompson, appellant herein. On August 21, 1886, John Roberts, mortgagee, brought suit in the district court of the fourth judicial district, in and for Yavapai County, against M. E. Collins, for the collection of the debt and a foreclosure of the mortgage. Robert Scofield and B. F. Thompson were made parties defendant. The allegation in the complaint as to defendants Scofield and Thompson was "that they claimed some interest, by purchase or otherwise, in and to said mortgaged premises; that whatever of interest or claim they, or either of them, may have in or to said mortgaged premises was acquired by them, and each of them, after the making and recording of said mortgage as aforesaid, and is subsequent and subject thereto." The prayer of the complaint with reference to those two defendants was, that the interest or claim of each of them to said mortgaged premises be decreed subject to said mortgage, and that said defendants, and each of them, and all persons claiming under them, or either of them, be barred and foreclosed of all right or claim of equity of redemption. The record fails to show the nature of the service of summons upon the defendants Scofield and Thompson, but the unchallenged statement in the brief is that Scofield was personally served with summons and complaint, and Thompson by publication, and that copies of each were mailed to him. The judgment recites that it appeared to the court that the defendants, M. E. Collins, Robert Scofield, and B. F. Thompson, and each of them, were regularly served with summons, and that they, and each of them, had failed to appear, but made default, and that the default of said defendants, and each of them, had been regularly entered. Said judgment was rendered on the fifteenth day of December,

1886, and after adjudging in favor of plaintiff Roberts, and against the defendant Collins, as to the debt, it decreed that, all and singular, the mortgaged premises mentioned in plaintiff's complaint be sold at public auction by the sheriff of Yavapai County, after giving the proper notice, and that the sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale. It further decreed "that the defendants, Collins, Scofield, and Thompson, and each of them, and all persons claiming or to claim from or under them, or either of them, and all persons having liens subsequent to the said mortgage, by judgment or decree, upon the lands described in said mortgage, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises, and every part thereof, from and after the delivery of the sheriff's deed." The premises described in the decree were the Poland and Hamilton mining claims, by metes and bounds. The mortgagee, John M. Roberts, became the purchaser at the sheriff's sale on the 17th of March, 1887, and received a certificate of sale describing the Poland and Hamilton mining claims by metes and bounds, and on the thirtieth day of September, 1887, received a sheriff's deed therefor. The Poland and Hamilton mining claims at that time were unpatented mining locations. On the 20th of July, 1891, James R. Lowry, as administrator of the estate of John M. Roberts, deceased, conveyed all the right, title, and interest which said John M. Roberts had at the time of his death, and all right, title, and interest which his estate may have acquired since his death, in and to the Poland and Hamilton mining claims, to E. M. Dickey. Thereafter, on December 14, 1891, Dickey made a relocation of the Poland and Hamilton mining claims in his own name. In 1892 he made application to the United States land office for a patent to each of those claims in his own name, and on the first day of May, 1893, received a patent to the Poland claim, and on the twentieth day of June, 1893, received a patent to the Hamilton claim. After Dickey made application for patent, he conveyed, March 10, 1892, an undivided one-half interest in said mining claims to F. M. Murphy. The transfers of title after patent issued to Dickey are as follows: March 2, 1894, Dickey to Charles D. Arms, an undivided one-half interest; July 2, 1894, F. M.

Murphy to D. M. Ferry, Simon J. Murphy, and Charles C. Bowen, an undivided one-half interest; on May 4, 1895, Charles D. Arms to E. B. Gage, an undivided one-half interest; on May 13, 1894, E. B. Gage to D. M. Ferry, Simon J. Murphy, and C. C. Bowen, an undivided one-half interest (said Murphy, Ferry, and Bowen being the appellees herein); and on July 23, 1896, Robert Scofield conveyed to appellant, B. F. Thompson, all of the interest in the Poland and Hamilton mining claims which he had acquired by deed from Collins on the 14th of November, 1883. On October 6, 1896, appellant, B. F. Thompson, brought action against appellees, alleging his ownership in and to an undivided one-half interest in the Poland and Hamilton mining claims; praying that defendants, Ferry, Murphy, and Bowen, be declared trustees for plaintiff of plaintiff's one-half interest, and that they be decreed to convey the same to him. Defendants answered, and plead: 1. An estoppel of record, by virtue of the foreclosure suit of Roberts against Collins, Scofield, and Thompson; 2. That whatever interest plaintiff or his predecessors may have heretofore had, the same was canceled and annulled by the application for an issuance of patent to Dickey; 3. That defendants were *bona fide*, actual, and innocent purchasers, without notice, actual or constructive, of any claim, legal or equitable, by plaintiff; 4. That defendants and their grantors have been in the peaceable and adverse possession of said mining claims, under title or color of title, since September 30, 1887. Alleged possession, development work, and improvements, of which plaintiff and his grantors had actual and constructive notice. The district court found for the defendants,—that defendants, for five years before suit filed October 6, 1896, had been in open, notorious, exclusive, peaceable, and adverse possession of both the Poland and Hamilton mining claims, and plaintiff was barred by the statute of limitations. From which judgment plaintiff appealed.

Morrison & Morrison, for Appellant.

The possession of one cotenant is the possession of all his cotenants. Sedgwick & Waite on Trial of Title of Land, par. 750; *Kinney v. Slattery*, 51 Iowa, 354, 1 N. W. 626; *Foble v. Bond*, 12 (Vroom) N. J. 427; *Mallett v. Uncle Sam etc. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Melton v. Lamboard*, 51 Cal. 258; *McCauley v. Harvey*, 49 Cal. 497.

In cases where a possession may be lawful and rightful, it cannot be presumed to be adverse. Thus one tenant in common cannot be presumed to hold adversely to the other, unless something more is shown than lapse of time. A trustee cannot be held to hold adversely to his *cestui que trust*; on the contrary, he is presumed to hold for his *cestui que trust* until the contrary appears. Perry on Trusts, sec. 866.

The trustees must clearly repudiate the trust and assume an adverse position, with notice to the *cestui que trust*, before the statute of limitations can begin to run. Perry on Trusts, sec. 863; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610.

To enable the trustee, without giving up possession, to turn it into an adverse holding, against the *cestui que trust*, the evidence must be clear and unmistakable, and such adverse claim must be brought home to the *cestui que trust* beyond a question of doubt. Perry on Trusts, sec. 864.

The tenant in common has a right to presume that the possession of his cotenant is his possession until informed of the contrary either by express notice or by acts and declarations which may possibly be equivalent to notice. *Miller v. Myles*, 46 Cal. 535; *Agiero v. Alexander*, 58 Cal. 21-28. See particularly *Union Cons. Silver M. Co. v. Taylor*, 100 U. S. 37; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192.

T. W. Johnston, for Appellees.

STREET, C. J.—Whatever may have been the condition of the legal title before Dickey received a patent, after the United States patent was issued to Dickey the legal title was in Dickey and his assigns, and at the time this action was brought the legal title was in appellees. This condition of the title was well recognized by the respective parties; and plaintiff sues in equity to recover his lost legal title to the undivided one-half interest, which was absorbed by Dickey in the issuance of the patent. It is well settled that, where a patentee has taken unto himself a title from the government, which, before patent issued, rested in himself and others, as tenants in common, by virtue of location interests, the patentee holds the title in trust for the true owners, and that a bill in equity will lie to enforce such a trust. *Johnson v. Towsley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 530; *Marquez v. Frisbie*, 101 U. S. 473;

Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. 605; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192; *Cattle Co. v. Becker*, 147 U. S. 47, 13 Sup. Ct. 217. Where, from the relation of the parties, it can be inferred that the patentee was acting, not alone for himself, but for his cotenant as well, a court of equity will decree that in acquiring his patent he acted for the benefit of the cotenants. If there had been a previous recognition by the patentee of the rights of his cotenant, or if he took undue advantage of his cotenant, or where relations of trust and confidence between the patentee and his cotenant existed, the patent would inure to the benefit of all of the owners of the property. If no such trust relation existed; if the claim of the patentee has ever been adverse to his cotenant, and if at the time of his application, and prior thereto, he had constantly asserted his right to the whole of the property; if the cotenant was aware of the application for patent by the adverse holder in his own name alone, and was aware of the assertion of adverse rights, and the patentee had not done or said anything to cause his cotenant to believe that he was acting in his behalf as well as in his own, and had quietly permitted patentee to obtain the legal title,—it is doubtful if a court of equity would interfere. The Revised Statutes of Arizona on limitations of actions for land relied upon by appellees is as follows, to wit: “Par. 2297. Every suit to be instituted to recover real property as against any person in peaceable and adverse possession thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards. Par. 2298. By the term ‘title’ is meant a regular chain of transfer from or under the sovereignty of the soil, and by ‘color of title’ is meant a consecutive chain of transfer down to such person in possession without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing. . . . Par. 2299. Every suit to be instituted to recover real property as against any person having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards.” It was not pretended by appellant that he or his predecessors had been operating the

mines, or either of them, or doing any work thereon, by way of annual expenditure or otherwise, which makes the physical index of possession, but he relied wholly upon his legal rights as tenant in common with appellees and their predecessors in interest. He treats the sheriff's deed, the administrator's deed, and the relocation notice, as well as the patent, as instruments in harmony with his rights, and not adverse to them. Freeman, in his work on Cotenancy, says: "A conveyance by one cotenant, purporting to convey an estate in severalty, cannot operate to the prejudice of the other. This is true only so far as the immediate effect of such conveyance as a transfer of title is concerned. It does not follow that no rights can grow out of it; nor that it is, even as against the other cotenants, mere waste paper for all purposes. Such a conveyance constitutes color of title. The entry of the grantee, made under the deed, and claiming an interest coextensive with that with which the deed purports to deal, is an entry under color of title. The cotenants are therefore bound to take notice of the deed, and of the entry made under it, and to take such steps as may be required to enforce a recognition of their legal rights. Should they fail to do so within the time prescribed by the statute of limitations, their rights will be no longer susceptible of enforcement; and their interests, by operation of that statute, will vest in the party in possession under the deed." In the *syllabus* of the case of *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100, there is a correct summary of the matter, as follows, to wit: "The possession of one tenant in common is the possession of his cotenant. There is no element of hostility in such a possession. An actual adverse holding will not operate as an ouster, and set the statute of limitations in motion, until the tenant out of possession has notice of such holding. But, if the hostile character of the possession is so openly manifested that his observation, as a man reasonably careful of his interests, would be sufficient to discover it, he will be deemed to have notice. Thus, where one of the two tenants in common conveys to a third person by deed purporting to convey the whole land, and the deed is recorded by the grantee, who enters under it, such entry is hostile in its nature; and the mere fact of possession by a stranger is enough to put him on inquiry and charge him with notice. So the making of valuable improvements, paying the taxes upon the

land, and receiving the rents and profits, without accounting or offering to account, are circumstances indicating an adverse holding; and their effect upon the cotenant is the same as if notice were directly communicated to him. The means of knowledge being furnished by the open and notorious character of the possession, he is chargeable with the actual notice."

The assignments of error relate principally to the finding of the court upon the statute of limitations, in which we think the district court was logically correct in its conclusions. How stands the case of the plaintiff, under the equitable doctrine of laches? Let us review the facts: In 1884 and 1885 the then owners of the properties—Collins, Scofield, and Thompson—placed a mill on one of the mines, or on land adjacent thereto, and commenced development work for the purpose of immediate revenues. The proposition was a flat failure. Collins abandoned the idea of pursuing his interests in the claims further, and allowed foreclosure proceedings of his mortgage. He went away, and left Scofield and Thompson in the vicinity of the mines. Scofield moved the mill away, and nothing from that day until the present has been done or attempted to be done on the mines, by way of annual expenditures, development work, or work for revenue, by either Scofield or Thompson. They were aware of the mortgage-foreclosure proceedings by Roberts, and neither of them paid any attention to the suit, or to the allegation in Roberts's complaint against them that they claimed an interest in the mines, nor opposed his prayer that their interests be foreclosed. After the execution of the sheriff's deed, Roberts alone performed the annual expenditure upon the mines, up until the time of his death; and neither Scofield nor Thompson made any efforts to do anything with the mines, or give any expressions of their interest in them. After Roberts's death there were administration proceedings, and an administrator's deed, which,—engaging in legal presumptions,—we must conclude was after legal notice given to all parties interested in the mines. Dickey obtained his deed, and went into manual possession of the mines, by doing work thereon sufficient to keep the locations alive. In 1891 he made a relocation of the mines. It is claimed by appellant that those relocations were made for the purpose of correcting descriptions; but they were made in Dickey's name alone, without any word of protest from either

Scofield or Thompson. In 1892 Dickey made application for patent in the United States land office; and, engaging in legal presumptions, we must conclude that, following the application, notices were posted as in such cases required. There is no showing in the record that Thompson and Scofield were not aware of any of these proceedings. A patent was issued in 1893 to Dickey, and following the issuing of the patent there were transfers as follows: One-half interest by Dickey to Arms, one-half interest by F. M. Murphy to appellees, one-half interest by Arms to Gage, and one-half interest by Gage to appellees; and during all of this time neither appellant nor Scofield made any protest or made any claim to any interest in the mines, and the record is still silent about their being unaware of the transfers. Under each of the transfers of title the grantees went into possession, and operated the mines. They have permitted the present owners of the title to expend thirty thousand dollars in improvements and development work; they permitted appellees and their assigns to do development work upon the mines to the extent of running over two thousand feet of tunnels; and still the record is silent as to Scofield and Thompson being unaware of the work going on, while it is asserted by appellees that Thompson and Scofield were aware of every step in the transfer of titles. It is asserted by appellees that they were fully cognizant of the development work done upon the mines, the running of the tunnels, and the expenditure of the vast sums of money to put the mines in working shape, yet from 1886 to 1896 they have not been heard to make a claim to any interest in the mines. Under the equitable doctrine of laches, Thompson is estopped from now asserting that he is a cotenant, and that appellees are trustees of the title for his use. The judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 642. Filed June 2, 1899.]

[57 Pac. 639.]

THE NATIONAL BANK OF ARIZONA, Plaintiff and Appellant, v. A. A. LONG, City Assessor and Tax-Collector of the City of Phoenix, Defendant and Appellee.

1. TAXES AND TAXATION—NATIONAL BANKS—PERSONAL PROPERTY—POWER OF CITY TO TAX—REV. STATS. U. S., SEC. 5219, CONSTRUED.—Personal property of a national bank is not taxable by a city under section 5219, *supra*, providing that shares of stock of a national bank may be taxed in the city where the bank is located at the same rate as other moneyed capital in the hands of individual citizens, if such tax be authorized by any statute of the state or territory where such bank is located.
2. SAME—SAME—SHARES OF STOCK—MAY BE, BUT ARE NOT REQUIRED TO BE, TAXED BY CITIES—REV. STATS. U. S. SEC. 5219; LAWS OF ARIZONA, 1897, ACT NO. 51; PHOENIX CITY CHARTER CONSTRUED.—United States statute, *supra*, permits the taxation of shares of stock of national banks, but the legislature must determine and direct the manner, mode, and place of taxing, and taxation is not required in the absence of action by local legislature. Act No. 51, *supra*, providing that counties shall tax the shares of stock of any banks therein, does not apply to cities. The general provision in charter, *supra*, granting the power to levy city taxes upon all real and personal property within the city cannot be construed as directing and determining the manner and place of taxing such shares of stock, or as authorizing their taxation.
3. TAXES AND TAXATION—DOUBLE TAXATION—REVENUE ACT—NOT REPEALED BY ACT NO. 51—BANKING CO. v. MURRAY, ANTE, P. 215, 56 PAC. 728, APPROVED.—Act No. 51 of the Laws of Arizona of 1897 does not repeal the general provisions of the revenue laws with reference to double taxation, but merely changes, in the case of banks and banking institutions, the manner of taxation, by providing for the assessment and taxation of the shares of stock instead of the property of the bank. *Banking Co. v. Murray, supra*.
4. TAXES AND TAXATION—ILLEGAL—EQUITY WILL RELIEVE AGAINST—INJUNCTION.—The taxation by a city of shares of stock of a national bank is not merely an irregularity, but an attempt to tax property which is exempt from taxation, and therefore presents such a case as equity may relieve against by injunction.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Reversed.

The facts are stated in the opinion.

Joseph Campbell, for Appellant.

Shares of the stock of a national bank cannot be assessed unless there is a law passed by the proper lawmaking power authorizing it, in accordance with the permission given by section 5219 of the Revised Statutes of the United States. *People v. Moore*, 1 Idaho, 504.

"It is doubtful if Congress in permitting states to tax shares of national banks intended thereby to authorize cities and towns to exercise the same power." *National Bank v. Richmond*, 39 Fed. 313.

Not only has the city attempted to tax the bank stock, but it has also taxed the furniture, fixtures, and vault of the bank. Even if there was an ordinance permitting it, it would be illegal. Congress has given permission to a state or territory to pass a law taxing the *shares* to the *shareholders*, and the real estate to the bank. No other property can be assessed or taxed. *Rosenblatt v. Johnson*, 104 U. S. 462; *Bank v. Covington*, 21 Fed. 484; *First National Bank v. Kreig*, 21 Nev. 404, 32 Pac. 641; *Bank of Oskaloosa v. Young*, 1 Nat. Bank Cases, 451, 25 Iowa, 311.

Walter Bennett, for Appellee.

SLOAN, J.—The National Bank of Arizona brought this action to enjoin the appellee, A. A. Long, as city assessor and tax-collector of the city of Phoenix, from proceeding to collect, by the sale of the shares of the capital stock and of the personal property of the bank, the delinquent taxes thereon levied by said city for the year 1897. The complaint set up that the said bank, for the year 1897, at the request of said assessor, made out and delivered to the said assessor a list of its shareholders, specifying therein the number of shares that each of said shareholders owned; that thereupon the assessor had placed upon the assessment-roll of the city of Phoenix, and assessed in the name of and against the bank the shares of its capital stock, at a valuation of one hundred thousand dollars, and that said assessor also placed upon said assessment-roll, and assessed to the bank, its furniture, fixtures, and vault, situated in the banking-house of said bank, and used by it in

carrying on its banking business, and fixed and placed the valuation thereof at the sum of two thousand dollars, making a total assessment against the bank in the sum of one hundred and two thousand dollars; that the city thereafter levied upon the said property a tax of \$907.80, to which sum has been added \$35.60 as delinquent penalties and costs; that the tax-collector has advertised the property so assessed for sale for said taxes. The prayer of the complaint was for a decree declaring the taxes levied as aforesaid void, and for a perpetual injunction against the said tax-collector from proceeding to collect the same. The city attorney stipulated upon the trial of the action that the allegations contained in the complaint were true, which left no fact to be determined by the court, but only a question of law, which was, were the shares of stock of the bank and its personal property taxable by the city. The court below gave judgment for the defendant, from which judgment the bank has appealed.

There can be no question but that the personal property of the bank was not taxable by the city under section 5219 of the Revised Statutes of the United States. Under this section the shares of stock of a national bank may be taxed in the city where the bank is located at the same rate as other moneyed capital in the hands of individual citizens, if such tax be authorized by any statute of the state or territory where such bank is located. While, by section 5219, the shares of stock of a national bank may be assessed and taxed, it is left to the legislature of each state or territory to determine and direct the manner, mode, and place of taxing the shares of national banks located within such state or territory. In other words, section 5219 permits the taxation of shares of stock of national banks, but does not, in the absence of local legislation determining and directing the manner and place of such taxation, require such taxation. The question whether the assessment of the shares of stock of the National Bank of Arizona, of the city of Phoenix, as made in this case, was lawful must be determined by reference to act No. 51 of the Laws of 1897, which is an attempt to determine and direct the manner and place of taxing the shares of national banking associations located within the territory, and also by reference to the provisions of the charter of the city of Phoenix with reference to the taxing power of the city. Section 1 of said act No. 51

provides that "all shares of stock of every national bank or banking association . . . shall be assessed and taxed in the county where such national bank or banking association is located for the transaction of business." Section 6 provides that if the sworn statement showing the number and amount of shares of a national bank or association or corporation, and the name and residence of each shareholder, and the number and amount owned by him, be not, on the demand of the assessor, furnished by the officer in charge of such bank, the said assessor shall, in the name of the territory, at his relation, institute proceedings in *mandamus* to compel such statement to be furnished. It further provides that such officer of such bank who fails to furnish such statement shall forfeit an amount equal to double the amount of taxes due, which is to be recovered by the county in a civil action as for debt, and, when so recovered, to go into the school fund of such county where such bank is located. The act further provides that this action must be brought by and in the name of such county. In no provision of the act is reference made to the assessment and taxation of shares of stock otherwise than by the county where such national bank or banking association is located, nor is there any provision for the collection of such tax otherwise than by such county. That the legislature had in mind only the taxation of shares of stock by the counties wherein such bank may be located is further evidenced by the provision we have referred to above, providing for a penalty for refusing to make the statement required by the act by the officer in charge of such bank, and for a suit in behalf of and in the name of the county to recover such penalty, and providing, when so recovered, that the amount of such penalty shall go into the school fund. Reading the act as a whole, and scanning every provision it contains, we cannot find any expression or reference which indicates that act No. 51 was meant to apply to cities as well as to counties, and to authorize the former to tax the shares of stock of national banks or other banking institutions; nor is there any provision of the charter of the city of Phoenix which by the most liberal construction can be construed as directing and determining the manner and place of taxing such shares of stock, unless it can be gathered from the general provision of the charter granting the city power to levy city taxes upon all real and personal property

within the city. A general provision of this kind, which might be construed to permit the taxation of shares of stock in banking institutions owned by residents of such city, where taxation of such shares is not expressly prohibited, cannot, certainly, be construed as authorizing the taxation of shares of stock of a bank located in such city, owned by non-residents of the city. Shares of stock in a corporation are of the class of property which takes the *situs* of its owner. Therefore, before such property can become the subject of taxation within the city, it must be owned by a resident of the city, or there must be some express provision of law authorizing its taxation. We held in the case of *Banking Co. v. Murray* (decided at this term), *ante*, p. 215, 56 Pac. 728, that the purpose of act No. 51 was not to repeal the general provisions of the revenue laws with reference to double taxation, but merely to change, in the case of banks and banking institutions, the manner of taxation, by providing for the assessment and taxation of the shares of stock instead of the property of the bank. Our construction of said act, limiting it to counties, leaves the power of cities to tax the property of banks unaffected, wherever that could be done before passage of act No. 51.

Construing said act as we do, the attempt on the part of the city of Phoenix to assess and tax the shares of stock of the National Bank of Arizona must be regarded as more than a mere irregularity, and as an attempt to tax property which is exempt from taxation, and therefore presents such a case as equity may relieve against. The judgment of the district court will therefore be reversed, and the cause remanded, with instructions to the court below to enter its judgment in accordance with the prayer of the complaint.

Davis, J., and Doan, J., concur.

[Civil No. 660. Filed June 2, 1899.]

[57 Pac. 607.]

HENRY MENAGER, Plaintiff and Appellant, v. RICHARD FARRELL, Defendant, and ALBERT STEINFELD, Intervener, Appellees.

1. ATTACHMENT—LEVY—RANGE CATTLE—LAWS ARIZ. 1889, ACT NO. 20 SEC. 9, SUBD. 3, CONSTRUED—CHATTEL MORTGAGE.—Where the sheriff in making a levy of attachment upon range cattle fails to serve at the time any notice of such levy upon the owner or his herder or agent, and fails to file any such notice with the county recorder as required by statute, *supra*, such levy created no lien, and a chattel mortgage made and filed by the owner to the interveners subsequent to the attempted levy was a good and valid prior lien upon said cattle, though the provisions of the statute regarding the levy of an attachment were thereafter complied with.
2. APPEAL AND ERROR—FORMER APPEAL—LAW OF CASE—RES ADJUDICATA—SNYDER v. PIMA COUNTY, ANTE, P. 41, FOLLOWED.—The final judgment of an appellate court becomes the law of the particular case and is not subject to review thereafter on second appeal. *Snyder v. Pima County*, *supra*, followed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, for Appellant.

S. M. Franklin, for Appellees.

DOAN, J.—The question presented in this case is the validity and effect of an attachment-lien upon the property of an attachment-debtor by reason of a partially completed attachment-levy, as against the lien created by a chattel mortgage in favor of another creditor, where the mortgage was given and placed of record after the initial steps taken for the attachment-levy, but before the completion of the levy and the consequent establishment of the attachment-lien thereunder. The appellant, the plaintiff in the lower court, had caused an at-

tachment to be issued, and had attempted to levy the same upon the cattle of the O I L brand belonging to the defendant. Our statute (Laws 1889, act No. 20, sec. 9, subd. 3) providing that a levy upon range cattle may be made by the officer without going upon the range, says: "Such levy shall be made in the presence of two or more credible persons and notice thereof shall be given in writing to the owner, or his herder, or his agent, if residing in the county and known to the officer making the levy, and a copy of such notice, attached to a copy of the writ, shall be filed by the officer with the county recorder of the county wherein the levy is made." In this case the sheriff made the levy in his office, indorsed the return of the levy upon the back of the writ, and filed the writ and his return thereon with the county recorder, but did not serve at that time any notice of such levy upon the owner, or his herder or agent, nor file any copy of such notice with the recorder, as required by the statute. Four days afterwards the attachment-debtor executed a chattel mortgage upon this property to the intervener, who at once placed the same of record, and thereby established and perfected his lien under the mortgage upon the property. After the execution and record of the mortgage, and on the same day, the sheriff served upon the owner the notice of the levy of the attachment, in pursuance of the requirement of the statute, but did not file a copy of said notice with the county recorder, as was further required, and had not, up to the time of the trial in the district court, filed a copy of such notice, attached to a copy of the writ, with the recorder. Upon the trial of the case the district court held that the acts of the officer constituted a good and valid levy of the attachment, and that the lien established by the levy under the said writ was prior to the lien under the chattel mortgage of the intervener, and valid as against such chattel mortgage. The case was carried on appeal to this court, and on June 11, 1898, the judgment of the lower court, was reversed, and the case was remanded for a new trial. *Steinfeld v. Menager, ante*, p. 141, 53 Pac. 495. After the case was reversed in this court, and remanded for a new trial, the counsel for the appellant herein filed with the recorder on November 18, 1898, a paper purporting to be a copy of the notice that had been served on March 24, 1897, upon the owner of the cattle. This case was again tried in the district court, and the judg-

ment of that court, rendered in accordance with the decision of this court, held that "the attempted levy of the writ of attachment created no lien, that the chattel mortgage of the intervener was a good and valid lien on said cattle, and prior to said attachment." From the judgment the plaintiff has appealed to this court.

It is not necessary to consider whether, in the absence of any adverse lien established *ad interim*, it would be possible to perfect a levy by filing at this late date a paper the filing of which was a necessary prerequisite to the establishment of a lien thereunder, for this paper was filed more than a year after the chattel mortgage of the intervener, and would therefore not affect the validity of the lien that had been established by the execution and filing of that instrument, even though it might have been considered a compliance with the statute, if it had been filed before any such adverse lien had been acquired. The issue presented to the court was the *status* of the property on March 24, 1897, when the chattel mortgage was placed of record. The district court held that at that time no sufficient levy of the attachment had been effected to create a lien, and therefore the lien of the chattel mortgage attached, and secured priority. In harmony with this view are *Graham v. Reno*, 5 Colo. App. 330, 38 Pac. 835; *Wade on Attachments*, par. 126; *Maskell v. Barker*, 99 Cal. 642, 34 Pac. 340; *Robertson v. Hoge*, 83 Va. 124, 1 S. E. 669; *Main v. Tappener*, 43 Cal. 206; *Sharp v. Baird*, 43 Cal. 573; *Arms v. Burt*, 1 Vt. *303, 18 Am. Dec. 680; *Repine v. McPherson*, 2 Kan. 340; *Thompson v. White*, 26 Colo. 226, 54 Pac. 718. These authorities very clearly sustain the position that there must be a strict compliance with the statutory provision to make the levy valid, and a lien upon the property; that an attachment lien does not become valid and effective and enforceable until the attachment writ is properly and completely served. The question presented on this appeal is the same that was presented on the former appeal in this case, and we cannot do better than adopt that language of this court in *Snyder v. Pima County*, *ante*, p. 41, 53 Pac. 6: "We are satisfied with the former judgment of this court upon the question presented, and see no reason for disturbing it. But even though we should now be convinced that this court had made a mistake in its former judgment, . . . yet that judgment is the law

of this case. Its consideration is more that *stare decisis*. It becomes *res adjudicata*. While this court may reserve to itself the right to reverse that decision as it may be applied to another case, yet it is well settled that a judgment of an appellate court in a case becomes the law of that particular case, and is not subject to review thereafter on second appeal. *Bradley v. Norris*, 67 Minn. 48, 69 N. W. 624; *Pierce v. Underwood*, 112 Mich. 186, 70 N. W. 419; *Commissioners v. Bonebreak*, 146 Ind. 311, 45 N. E. 470; *Krantz v. Railway Co.*, 13 Utah, 1, 43 Pac. 624; *Bank v. Lewis*, 13 Utah, 507, 45 Pac. 890; *Isert v. Davis*, 18 Ky. Law Rep. 510, 37 S. W. 151. The supreme court of the United States in *Stewart v. Salamon*, 97 U. S. 361, settles the law for us in the following language: 'An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court in exact accordance with our mandate on a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves.' In this case the district court determined the case in accordance with the judgment and decree of this court. To now reverse the judgment of that court by changing a rule laid down by this court for its guidance would be to condemn the action of the judge for doing that which this court had directed to be done." The judgment of the district court is affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 664. Filed June 2, 1899.]

[57 Pac. 608.]

C. A. SEWALL. Plaintiff and Appellant, v. MRS. EMMA HATCHER et al., Defendants and Appellees.

1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—LIABILITY FOR HUSBAND'S DEBTS—EVIDENCE—APPEAL AND ERROR—FINDING ON CONTROVERTED FACTS SUSTAINED—ANDERSON v. TERRITORY, ANTE, p. 185, CITED.—W. H. Hatcher, the husband of defendant, having broken his leg, wrote a letter to a merchant at Prescott, advising him to send Mrs. Hatcher and a surgeon. The merchant informed Mrs. Hatcher and asked her what doctor he should send. She

told him that plaintiff always attended Mr. Hatcher. The merchant notified plaintiff by messenger and personally, and hired a team for him. The plaintiff, learning that Mrs. Hatcher desired to go with him, drove to her house and took her with him. He testified that Mrs. Hatcher told him that she would see him paid. After Mr. Hatcher's recovery, the plaintiff presented two bills and wrote a couple of letters to Mr. Hatcher, and afterwards made out an account against defendant, which his attorney mailed to her and afterwards brought suit upon. Defendant testified in direct contradiction to plaintiff in regard to his employment by her, and stated that she did not employ him herself nor agree to pay him out of her separate estate. *Held*, that the evidence brings the case within the rule that a "finding of the lower court upon a controverted fact will not be disturbed by this court on appeal, unless such finding is clearly against the weight of the evidence," and therefore a judgment upon a finding for defendant will be affirmed. *Anderson v. Territory, supra*, cited.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

T. W. Johnston, for Appellant.

Kibbey & Edwards, and J. M. Damron, for Appellee.

DOAN, J.—Dr. C. A. Sewall sued Mrs. Emma Hatcher, a married woman with separate property, for professional services alleged to have been rendered at her instance and request to her husband, W. H. Hatcher, who was made co-defendant originally, but as to whom suit was dismissed, and against whom no judgment was asked. Writ of attachment was issued and levied upon her separate property, consisting of real estate, the title of which was in the name of Mrs. Hatcher, who denied the employment of plaintiff and appellant, or any agreement on her part to pay him out of her separate property. The action was first brought in the justice's court, where trial was had before a jury, and a verdict rendered for the defendant. An appeal was then taken to the district court, where the case was again tried to a jury before his Honor H. C. Truesdale, at the conclusion of which trial the jury, on the instruction of the judge, returned a verdict for

the defendant. A motion for a new trial because of the ruling of the judge in taking the case from the jury was granted after the death of Judge Truesdale, by Hon. Webster Street, his successor upon the bench, before whom the case was again tried upon the evidence that had been formerly submitted and the record in the case, and a judgment rendered for the defendant. From this judgment and the order of the court denying a new trial the plaintiff appealed to this court.

It is assigned as error: 1. "That the court erred in not finding as a fact that, as alleged in the complaint, the defendant Mrs. Hatcher distinctly and unequivocally employed the plaintiff to render for her, and on her sole account, the professional services sued for." 2. "As a matter of law, the court erred in determining that it was not competent for this married woman to bind her separate estate upon such a contract as that sued on, where the services rendered were for the benefit of her husband."

This last error is incorrectly assigned. The court did not make any such determination. It was not questioned that Mrs. Hatcher could have legally bound herself to pay from her separate estate for the services alleged to have been rendered by Dr. Sewall for her husband. The only question passed on by the court was, Did she do so? This question—one of fact—the court decided in the negative.

It appeared in evidence that the plaintiff and defendant resided in Prescott; that W. H. Hatcher had his leg broken at Mescal Station, about twenty-eight miles from Prescott, and wrote a letter to Mr. Goldwater, a merchant in Prescott, advising him of the accident, and requesting him to send Mrs. Hatcher and a surgeon. Mrs. Hatcher and Mr. Goldwater testified that Goldwater read the letter to Mrs. Hatcher, and asked her what doctor he should send. She replied that Dr. Sewall always attended Mr. Hatcher. Goldwater testified that he sent one Thomas Duke to notify Dr. Sewall of the case. Duke testified that he delivered the message. Goldwater testified that he also saw the doctor on the street and personally told him, and hired the team driven by the doctor on that occasion, and afterwards paid the liveryman for the same. Dr. Sewall testified that he received the word from Duke and Goldwater, hired the team from the liveryman, and

then learned that Mrs. Hatcher desired to go with him, drove to her house, and she got in the wagon and rode with him twenty-eight miles to her injured husband, assisted in caring for him, and returned with them next morning. Dr. Sewall testified that in the wagon, on the road going, Mrs. Hatcher told him she would see him paid. After their return he attended the injured man several weeks, until he was fully recovered. After his recovery the doctor presented to Mr. Hatcher two several bills made out against W. H. Hatcher, and wrote a couple of letters to Mr. Hatcher in regard to the account, all of which are filed in evidence. Afterwards he made out an account against Mrs. Hatcher, and his attorneys mailed that to her, and afterwards brought suit upon it. Mrs. Hatcher said she rode out in the wagon with Dr. Sewall and the driver, and returned next morning with them and her husband, but testified in direct contradiction to Dr. Sewall in regard to his employment by her, and stated that she did not employ him herself, nor agree to pay him out of her separate estate. This case was tried to a jury in the justice's court in the first instance, and their verdict found the facts against the plaintiff on the evidence presented. The same finding has been twice made by the district court. We have repeatedly held that a "finding of the lower court upon a controverted fact will not be disturbed by this court on appeal, unless such finding is clearly against the weight of the evidence." This proposition, like the kindred one that "the verdict of a jury on conflicting testimony will not be disturbed on appeal by this court, if there is any evidence to support the verdict," has been so generally conceded that it appears self-evident, and does not need the citation of authorities in its support. The cases of *Anderson v. Territory*, ante, p. 185, 56 Pac. 717; *Stockton Ice Co. v. Argonaut Land etc. Co.*, (Cal.) 56 Pac. 885; *Lower Kings River Reclamation Dist. v. McCullah*, 124 Cal. 175, 56 Pac. 887; *Cheney v. Woodworth*, 13 Colo. App. 176, 56 Pac. 979; *Pinson v. Prentise*, 8 Okla. 143, 56 Pac. 1049; *Board of Education v. Hobbs*, 8 Okla. 293, 56 Pac. 1052; *Schultz v. Barrows*, 8 Okla. 297, 56 Pac. 1053; *Everett v. Akins*, 8 Okla. 184, 56 Pac. 1062,—indicate that the courts of last resort are at present fully sustaining the view heretofore held on this question. The evidence presented in this action unquestionably places this case fully

in line with the authorities above cited. The judgment of the district court is therefore affirmed.

Street, C. J., and Davis, J., concur.

[Civil No. 676. Filed June 2, 1899.]

[57 Pac. 641.]

THE PROVIDENCE GOLD MINING COMPANY, Defendant and Appellant. v. DENNIS A. BURKE, Plaintiff and Appellee.

1. COMMON-LAW ACTION—WHAT CONSTITUTES—JURY—TRIAL BY—RIGHT TO—REV. STATS. U. S. SEC. 2326, ACT OF CONGRESS, MARCH 3, 1881, 21 STATS. AT LARGE, 505, REV. STATS. U. S., SEC. 1868, AND AMENDMENT, SUPP. REV. STATS. U. S. 1874-1881, P. 13, [SUPP. REV. STATS. U. S. 1891, P. 7,] CITED AND CONSTRUED—JORDAN v. DUKE, 4 ARIZ. 278, 53 PAC. 197, APPROVED.—An action on an "adverse" filed in the land office to contest the right of an applicant for United States patent, as provided for in United States statute, *supra*, is not a common-law action within the purview of section 1868, and amendment, *supra*, providing that "No party shall be deprived of a right to trial by jury in cases cognizable at common law."
2. CONSTITUTIONAL LAW—JURY—VERDICT—CONCURRENCE OF NINE JURORS—ACT NO. 51, LAWS OF ARIZONA, 1891, NOT IN CONFLICT WITH SEC. 1868, REV. STATS. U. S., AND AMENDMENT, SUPP. REV. STATS. U. S., 1874-1881, P. 13 [1891, P. 7.]—Section 1868 and amendment, *supra*, apply only to common-law actions, and therefore it is not error for the court to receive the verdict of nine jurors in an action on an "adverse," act No. 51 of the Laws of Arizona of 1891 making the concurrence of three fourths of a jury of twelve persons sufficient to render a verdict in all trials of civil cases and misdemeanors.
3. MINES AND MINING—FORFEITURE—EVIDENCE—BURDEN OF PROOF.—Forfeiture of a mining claim for failure to perform the necessary amount of work thereon, cannot be established except upon clear and convincing proof of the failure of the former owner to have the work performed, and the burden of proof is upon the party alleging the forfeiture.
4. SAME—LOCATION NOTICE—RECITALS IN—ADMISSIONS.—A location notice asserting that it is a relocation of another claim constitutes an implied admission of the validity of the first location.

5. **SAME—SAME—SUFFICIENCY OF NOTICE—EVIDENCE—ADMISSIBILITY—**
KINNEY v. FLEMING, ANTE, P. 263, 56 PAC. 723, APPROVED.—Where all the monuments are upon the ground, a location notice of a mining claim is admissible in evidence although the direction of the closing location line is indefinitely described, the location being sufficient in all other particulars.
6. **SAME—CITIZENSHIP—PROOF OF—EVIDENCE.**—The whereabouts of one of the locators of a mining claim not being ascertainable, and his citizenship being questioned, evidence is admissible as tending to show his citizenship; that he had made declarations of his citizenship to his friends and companions; that he had voted at elections in Arizona; that his name appeared upon the great register of Yavapai County; and that while a resident of Arizona he had located many mining claims, under declarations that he was a citizen of the United States.
7. **SAME—SAME—JOINT LOCATORS—CITIZENSHIP OF ONE SUFFICIENT TO GIVE TITLE, WHERE BOTH CONVEY.**—Where joint locators of a mining claim transfer the same by deed, the non-citizenship of one would not make the location invalid, and the grantee would obtain a perfect title to a valid mining location unaffected by such non-citizenship.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

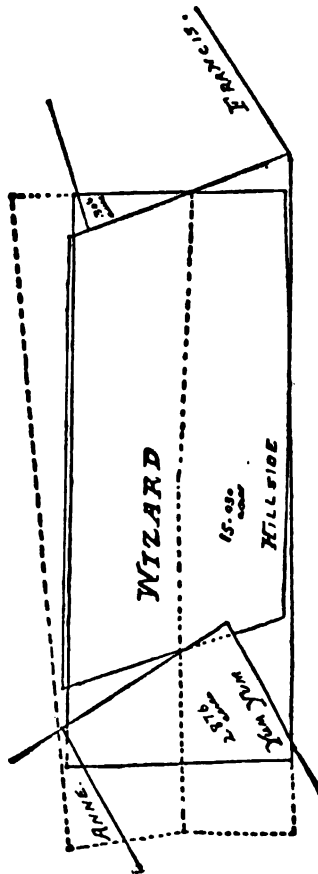
Statement of facts:—

The appellant, the Providence Gold Mining Company, claiming to be the owner of mining locations situated in Yavapai County, called the "Hillside," "Yum-Yum," and the "Francis," made application for United States patent therefor in the land office in Prescott. The appellee, Dennis A. Burke, filed his contest in the land office on May 8, 1897, and within thirty days thereafter commenced proceedings in the district court of Yavapai County to determine the question of right of possession, in accordance with the provisions of section 2326 of the Revised Statutes of the United States. The three mining locations claimed by appellant adjoin each other, and run in a general easterly and westerly direction. The Hillside lies in the middle, the Yum-Yum joins it on the westerly end with a strong deflection to the southwest, and the Francis joins the Hillside on the easterly end with a strong deflection to the northeast. Appellee made allegation in his complaint that he was the owner of the Wizard mining claim. By a

map filed as an exhibit with the complaint, he showed and alleged that the surface' boundaries of the Wizard location were substantially those of the Hillside location, and that there was a conflict between the Wizard claim and the claims for which appellant was seeking patents to the extent of 2.876 acres on the Yum-Yum, 15.030 acres on the Hillside, and .304 acres on the Francis. The Wizard claim was located May 24, 1893, by A. L. Butler and Joseph McKeague, and came into possession of appellee by mesne conveyances. The Yum-Yum claim was located July 6, 1893, by A. E. Baker and A. B. Lewis. The Hillside was located January 1, 1896, by A. B. Lewis and Henry Johnson. The Francis claim was located January 1, 1896, by S. E. Mensinger. The three claims, Yum-Yum, Hillside, and Francis, came into possession of appellant by mesne conveyances. The Hillside claim, whose lines are substantially those of the Wizard claim, is a relocation of the Wizard claim, and is described in the location notice as "formerly the Wizard mining claim, as a forfeited claim." The answer of appellant, after making allegations of the locations of the several claims, further alleges, and urges as a defense, that the annual expenditure for the year 1895 was not made upon the Wizard claim, and that the same was forfeited. The cause was tried before a jury, who returned a verdict in favor of plaintiff, Burke, the appellee herein. Judgment was rendered accordingly. The defendant appealed to this court, and assigned the following errors: Nos. 1, 2, and 3 relate to instructions to the jury. No. 4. That the court erred in permitting the introduction of the location notice of the Wizard claim to be read in evidence. No. 5. That the court erred in admitting the testimony as to the acts of location as to the Wizard claim. No. 6. That the court erred in admitting the deed from Joe McKeague, one of the locators, in evidence. No. 7. That the court erred in permitting any evidence to go to the jury as to Joe McKeague's having voted at Big Bug in 1894, to prove citizenship. No. 8. That the court erred in overruling appellant's motion for an order and decree in favor of defendant notwithstanding the findings and verdict of nine of the jurors. No. 9. That the court erred in overruling appellant's motion in arrest of judgment. No. 10. That the court erred in overruling appellant's motion for new trial.

No. 11. That the court erred in instructing the jury that under the law in this class of cases it is not required that a unanimous verdict be returned by the jury.

The following is a plat of the premises in question:—



Andrews & Ling, and H. D. Stocker, for Appellant.

The court erred in permitting any testimony to go to the jury as to Joe McKeague having voted at Big Bug in 1894. An attempt to prove a man's citizenship by simply voting at one election is incompetent in any case, and particularly so in actions of this kind. Citizenship of the locator of a mining claim is governed by section 2321 of the Revised Statutes of the United States. The only evidence which is admissible as to the citizenship of the locators of the Wizard

claim would be either depositions of the party himself, affidavits, or other testimony of the party himself.

Morrison & Morrison, for Appellee.

The party setting up forfeiture must prove it by a preponderance of evidence. *Hammer v. Garfield M. and M. Co.*, 130 U. S. 291, 9 Sup. Ct. 548.

Where a mining claim is a practical relocation of a former location and the notice of location refers to the former location as a forfeited claim, this is an implied admission on the part of the person claiming under the relocation of the validity of the former location. *Willis v. Blaine*, 4 N. Mex. 378, 20 Pac. 798; *Belk v. Meagher*, 104 U. S. 279; *Lindley on Mines*, par. 404.

That voting is an evidence of citizenship is sustained in *Boyd v. Thayer*, 143 U. S. 180, 12 Sup. Ct. 375. Citizenship may be proved like any other fact. *Lindley on Mines*, par. 227; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

STREET, C. J. (after stating the facts).—The last four assignments of error, numbered 8, 9, 10, and 11, may be grouped together. Counsel for appellant have made an exhaustive argument upon them, and have placed the errors there assigned in a prominent attitude. Grouped together, they relate to the rights of the parties to a trial by a common-law jury. The cause was tried before a panel of twelve. The court instructed them that: "Under the law in this class of cases, it is not required that a unanimous verdict be returned by the jury. If, therefore, you do not unanimously agree upon a verdict, but three fourths of you, or more, do agree upon a verdict, such verdict will be signed by your number constituting said three fourths, or more, and returned into court,"—upon which instruction a verdict was returned, signed by but nine of the jurors. Act No. 51 of the Session Laws of Arizona of 1891 provides as follows (section 1): "That in all trials of civil cases and in all trials of misdemeanors in the courts of this territory, where a jury of twelve persons shall be impaneled to try such case, the concurrence of three fourths ($\frac{3}{4}$) of such jury shall be sufficient to render a verdict therein. And in all such trials, when the said jury of twelve persons shall unanimously agree upon a verdict, said

verdict shall be signed by the foreman thereof, and returned into court; but where such jury do not unanimously agree upon a verdict, then said three fourths of such jury shall sign the verdict so agreed upon by them, and notify the court of such fact, and thereupon all of said jury shall be returned into court, and shall then deliver to the court the verdict so signed by three fourths ($\frac{3}{4}$) of such jury; and the court shall receive and cause to be read and recorded such verdict in the cause, and judgment shall be entered thereon as in other cases now provided by law. Provided, that in all trials of felony, the concurrence of twelve jurors shall be necessary to render a verdict." The act has already received a construction by this court in the case of *Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499, where it was held that the act, "in so far as it applies to cases cognizable at common law, must be held invalid, because in conflict with section 1868 of the Revised Statutes of the United States, which authorizes in the territories a commingling of common-law and chancery jurisdictions in the territorial courts, and a uniform course of proceeding in all cases, legal or equitable"; and provides also (Supp. Rev. Stats. U. S. 1874-1881, p. 13; 1891, p. 7), "No party shall be deprived of a right to trial by jury in cases cognizable at common law." Similar statutes have been upheld in other territorial jurisdictions when not in conflict with section 1868 of the Revised Statutes of the United States and its amendments. In the case of *Hess v. White*, 9 Utah, 61, 33 Pac. 243, the supreme court of Utah held that a statute providing that in all civil actions a verdict may be rendered by a concurrence therein by nine or more members of the jury was not in conflict with the constitution of the United States, "that in suits in common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved" (Amend. art. 7); nor in conflict with section 1868 of the Revised Statutes of the United States and its amendments, that "no party shall be deprived of the right to trial by jury in cases cognizable at common law." The supreme court of the United States, in the case of *Publishing Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. 618, in discussing the validity of the Utah statute, only held that it was in conflict with the provisions of the constitution and statute heretofore cited in cases arising at common law; that the provision of

the constitution and the acts of Congress secured to litigants in common-law actions the right to trial by jury in all its substantial elements. The same court, in the case of *Walker v. Railroad Co.*, 165 U. S. 593, 17 Sup. Ct. 421, in construing a territorial statute providing for special issues to be found by a jury, held that it was within the power of a legislature of a territory to provide that on a trial of even a common-law action the court may, in addition to the general verdict, require specific answers to inquiries; and when a conflict is found between the two, render such a judgment as the answers to the special questions compel.

The question, then, as to whether the court committed an error in instructing the jury that a verdict could be rendered by three fourths of their number, and by afterwards receiving a verdict signed by but nine of their number, can be settled by determining whether this particular action is a common-law action. This action is on an "adverse" filed in the land office to contest the right of an applicant for United States patent. In *Doe v. Mining Co.*, 43 Fed. 219, the question was raised by demurrer as to whether an "adverse" was a law action or a suit in equity. The demurrer raised the point that the suit should be dismissed for the reason that the complaint showed upon its face that the plaintiff had a full, adequate, and complete remedy at law by the ordinary action in ejectment. The court, after discussing the common-law actions for the recovery of land, decided that in the proceeding contemplated by the statute no such judgment could be rendered as was rendered in common-law actions; that the proceeding there provided for has not for its object the recovery of possession of the mining ground, nor is possession made by the statute the test of either party's right; that the action could be maintained whether either in or out of possession. "The sole object of the proceeding in court is the determination of the contest that arose in the land office, the point of which is, Which of the applicants, if either, is entitled to receive the patent from the government? The right of possession referred to in the statute is not the right which flows from and is a part of the title of ownership of private land. It has no relation to such right, but it is the right which flows from a compliance with the laws prescribed by Congress for the acquisition of a government patent for mineral lands.

Such a right never was, and never could be, the subject of any common-law action; and its determination, therefore, on the equity side of the court, cannot be, as argued for the defendant, a violation of that provision of the constitution which declares that the right of trial by jury shall be secured to all, and remains inviolate forever." In the case of *Rutter v. Mining Co.*, 75 Fed. 37, the two questions discussed were (1) whether such suits arise under laws of the United States, and (2) whether they are at law or in equity; and, after discussing the first question, the court proceeds: "The remaining question, as one of practice, is important, and seems never to have been directly considered by the supreme court, but has been by a few other courts, whose decisions have been contrary. The statute [Rev. Stats. U. S., sec. 2326] directs that when a party enters, in a local land office, his adverse claim to an application for patent to mining ground, he shall commence his proceedings in some court of competent jurisdiction to determine the question of 'the right of possession' to the ground in dispute, and, according to the judgment of such court, the rights of the parties are finally determined in the land office. By the act of March 3, 1881, this section is so amended that, if neither party shows title to the ground in controversy, neither will have judgment in his favor. So far as the court is concerned, it is a special proceeding, referred to its determination for the guidance of the land office, and the jurisdiction of the court in such cases is based upon prior proceedings in such office. The questions of title and patent for agricultural and other lands—similar matters—are determined by the local land office. The questions for consideration are such as may, if Congress had so directed, be adjudicated without the aid of a jury. There is nothing in the nature of the questions involved that entitles any of the parties to a trial by jury within the intent of the seventh constitutional amendment, for the whole proceeding, and every part thereof, is nothing more than a procedure established by the government for the disposal of its lands; and certainly it cannot be claimed that the purchaser can demand a trial by jury to determine his claim to government lands. In all such contests it must be remembered that the government is an interested party so far as to see that the claimants have complied with the mining requirements before they get any

title to the lands. The statutes and some decisions say that this action is to determine 'the right of possession' to the ground in controversy. If this were all, it might be determined by ejectment; but it is submitted that this is not 'all, and that the use of this expression in the statute is an inadvertence or an inaccuracy, for the entire import and object of the statute is to have determined the more important question as to who, if any one, is entitled to the patent. Frequently a party has a right to the possession, and not to the patent. He is entitled to the possession as soon as he duly locates a claim, but not to a patent until he shall have done the necessary work.' This action, then, is to find who is entitled to the conveyance from the government—from the trustee—for the land in controversy. Actions for conveyance of realty are essentially equitable. Again, whatever claim either party may have to the ground in controversy is based upon an equitable title alone, while the legal title remains in the government. Common-law actions deal with legal, and not equitable, titles." It was provided by section 2326 of the Revised Statutes of the United States that the action was to be brought "to determine the question of the right of possession." The act of Congress of March 3, 1881 (21 Stats. 505), was an amendment thereto, "that if, in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict." "In such cases costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to the patent for the ground in controversy until he shall have perfected his title." The supreme court of the United States, in the case of *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, construed those provisions, and held that the act of March 3, 1881, was not intended to require, and does not require, all suits under section 2326 to be actions at law and to be tried by a jury. They decided that the determination of the right of possession as between parties is pursuant to statute and in aid of the land office, and that the form of action was not provided for by the statute, and that either an action at law or suit in equity would lie, as either might be permitted under the particular circumstances. This court heretofore, in the case of *Jordan v. Duke*, ante, p. 55, 53 Pac.

197, in effect decided, that where both plaintiff and defendant to the action set forth fully the nature of their claims and asked for relief such action was in aid of the proceedings in the land office; and that a verdict could be rendered either for the plaintiff or defendant or for the government. We did not then go so far, nor do we now go so far, as to say that the government would have been concluded by a verdict in favor of either the plaintiff or defendant. The effect of a verdict in favor of the government would prevent either party from proceeding further in the land office in obtaining patent. In this action the parties in their pleadings set out at length their respective mining locations, and each asked for a judgment which, when filed in the land office as provided by the statute, would have permitted them to have proceeded in the land office without molestation of the other. No execution would issue for the possession of the land, and no other effect would have been given to the judgment than to have cleared away the obstructions which had been placed against the application for patent in the land office—purely a statutory remedy and statutory relief. That being the case, it was not a common-law action. The parties were not entitled, as a matter of constitutional right, to a verdict by a common-law jury. The jury, at best, was an advisory agent of the court, to enlighten its conscience, and not to control its judgment. Under the provisions of act No. 51 of the Laws of Arizona of 1891, the court did not commit an error in receiving the verdict of the jury signed by but nine of its members.

2. The first assignment of error is upon the following instruction: "And you are further instructed that the burden of proof is upon the defendant to show that the said O'Donnell failed to do the amount of \$100 worth of work upon what is known as the 'Wizard Claim' in the year 1895." Under the issue this was not an erroneous instruction. The answer admitted the former location of plaintiff's Wizard claim. Defendant made his locations upon the same ground upon the apprehension and theory that plaintiff's Wizard claim had been forfeited, and made such allegation in his answer. In the case of *Hammer v. Mining Co.*, 130 U. S. 291-301, 9 Sup. Ct. 552, where the same question was decided, it was said: "As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rests upon him;

that the only pretense of a forfeiture was that sufficient work, as required by law each year, was not done on the claim in 1882, and that the evidence adduced by him on that point was very meager and unsatisfactory, and was completely overborne by the evidence of plaintiff [citing the case of *Belk v. Meagher*, 104 U. S. 279]. A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed, or improvements made, to the amount required by law."

3. Assignments of error numbered 2 and 3 relate to instructions of the court to the effect that the location notice of the Hillside mining claim, containing, as it does, the assertion that the Hillside location is a relocation of the Wizard mining claim, makes an implied admission on the part of the defendant and its grantors of the validity of the location of the Wizard. In the case of *Wills v. Blain*, 4 N. Mex. 378, 20 Pac. 798, the supreme court of New Mexico, in regard to a similar instruction, held that the same was good. They say: "The relocater, when he so describes himself in the notice, solemnly admits, in an instrument which is made a matter of record, that he is not a discoverer of mineral, but an appropriator thereof, on the ground that the original discoverer has forfeited his right. The notice becomes in some sense an instrument of title—a record. It is the equivalent of an admission of record of an original locator that the locator claims a forfeiture by reason of the failure on the part of the first locator to make his annual expenditure. This we believe to be the doctrine of *Belk v. Meagher*, 104 U. S. 279, and on that authority sustained the instruction of the court below on that point." We need not take space in this opinion to insert the instructions given in this case and the instructions given in the case of *Wills v. Blain*, to compare them, but it will be sufficient for us to say that both use such language as, in effect, says that such a recital in the location notice of the relocated claim impliedly admits the validity of the prior location.

4. The fourth assignment of error is that the court erred in permitting the introduction of the location notice of the Wizard claim to be read in evidence, and specifies as the reasons,—1. That the citizenship of the locators had not been shown; and 2. That the location was vague and indefinite. The reason why the location notice was claimed as vague and

indefinite was because of the description of its exterior boundaries. The only point about which there is anything indefinite is in the direction of the closing location line. If the monument in the center of the claim is the point of beginning, the closing line would be a diagonal one from the southeast corner to the center of the claim. It was the evident intention of the locator to describe his closing line to meet the center side-line monument on the easterly side, which was described as three hundred feet from the point of commencing. In all other particulars the location is sufficient. The proof showed that all of the monuments were upon the ground. In the case of *Kinney v. Fleming*, decided by this court at the present term, and reported herein, *ante*, p. 263, 56 Pac. 723, a similar question arose as to the description of the monuments. We there said: "It is true, the position of the monuments as built upon the ground was described in such a way as to direction as to be confusing; but, if the statutory requirements were complied with, the notice would be sufficiently correct to allow its admission as evidence when offered by the defendant."

5. The fifth assignment of error is that the court erred in admitting testimony as to the acts of location of the Wizard claim, and appellant argues the assignment of error upon the ground that the complaint did not state such facts in regard to the location as would warrant any evidence of the location notice. Without making a reference to the allegations in the complaint, we think it will be sufficient for us to say that appellant's contention in that particular cannot be sustained.

6. The remaining assignments of error, numbered 6 and 7, relate to the proof of citizenship of McKeague, one of the locators of the Wizard. At the trial, McKeague was absent. Plaintiff showed that he had used every effort to find his whereabouts, and to have him present at the trial, but McKeague was unable to be found, which fact compelled the plaintiff to resort to proof of McKeague's citizenship from other sources. Evidence was adduced to show he had made declarations of his citizenship to his friends and companions; that he had voted at the elections held in the territory of Arizona, and that his name had appeared upon the great register of Yavapai County; and that while he was a resident of Big Bug Mining District, in Yavapai County, Arizona, he

had performed many acts of locating mining claims, through a long number of years, under the declaration that he was a citizen of the United States. That such evidence is legitimate, and tends to show citizenship, is sustained in the case of *Boyd v. Nebraska*, 143 U. S. 180, 12 Sup. Ct. 375. Anyway, plaintiff held and owned the Wizard mining claim by mesne conveyances from the joint locators, Butler and McKeague. It was strictly proven that Butler was a citizen, and, Butler being a citizen of the United States, the fact that McKeague was not a citizen of the United States could not operate to defeat the rights of Butler, or to throw the whole claim open to relocation. McKeague's situation at the most would have been one of simple incapacity to hold, without the effect of making the location invalid, if the co-locator, Butler, was a citizen at the time the location was made. Butler and McKeague having joined in a conveyance, their deed transferred to the grantee a valid mining location, unaffected by the non-citizenship of one of the locators. The judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 624. Filed June 2, 1899.]

[57 Pac. 621.]

J. H. HAMPSON, Plaintiff and Appellant, v. BERWILL B. ADAMS et al., Defendants and Appellees.

1. **INJUNCTION—DISSOLUTION—COMING IN OF SWORN ANSWER.**—It is a general rule of equity practice that upon the coming in of an answer denying the equities of a bill, the defendant is entitled to have the injunction dissolved.
2. **SAME—SAME—ANSWER—TAKEN AS TRUE.**—Where a motion to dissolve is heard upon the bill and answer, the responsive allegations of the latter must be taken to be true; and if the equity of the bill is sworn away the injunction may be dissolved.
3. **SAME—PLEADING—ANSWER—NOT A GENERAL DENIAL.**—A complaint in a suit to enjoin the collection of taxes alleged that the cattle upon which the taxes were levied were ranging over a mountainous country, that it was practically impossible to count them, but that

the ten thousand head returned to the assessor was a fair and just estimate of the number owned by plaintiff, and the board of equalization arbitrarily, and for the purpose of revenge, increased the number upon the assessment-roll. The answer denied that it was impossible to count the cattle, or that ten thousand head was a fair and just estimate of the number thereof, or that said number was all the cattle owned by plaintiff, and specifically denied the other allegations of the complaint. *Held*, that the answer is not a general denial, and therefore the doctrine that a general denial is not good in chancery is inapplicable.

4. SAME—DISSOLUTION—ANSWER—DISCRETIONARY—APPEAL AND ERROR—REVIEW.—If the dissolution of a preliminary injunction upon the coming in of a sworn answer denying the equities of the bill is not the plain duty of a court, it is an exercise of judicial discretion with which an appellate court will not interfere.
5. SAME—PLEADINGS—BURDEN OF PROOF—FAILURE TO OFFER EVIDENCE—RIGHT TO INJUNCTION.—Where in a suit for an injunction the case is submitted on the pleadings, without evidence, and the answer is responsive to and expressly denies the material averments of the complaint, the burden of proof being on the plaintiff, and he having failed to support by proof the allegations of his complaint, the court properly refused to grant a perpetual injunction.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. Fletcher M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Appellants.

John McGowan, District Attorney, Wiley E. Jones, and Lovell & Satterwhite, for Appellees.

The answer in the respective cases denies all of the material allegations contained in the respective complaints. Appellant was not therefore entitled to a judgment on the pleadings. *Ghirardelli v. McDermott*, 22 Cal. 539; *Bott v. Vandament*, 67 Cal. 332, 7 Pac. 753; *Amador v. Butterfield*, 51 Cal. 526.

“Generally speaking, judgment on the pleadings is only proper in cases where the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be introduced.” 2 Ency. of Plead. and Prac., p. 1030, and cases cited under note 6.

The burden is cast on plaintiff of proving every material allegation in the complaint which is denied in the answer. *Site v. Jewett*, 33 Cal. 92.

In *Watson v. Higgins*, 7 Ark. 475, it was held, that where no evidence at all was offered by the party upon whom the burden of proof is thrown by the pleadings, the other party is entitled to judgment.

Plaintiff is never entitled to judgment on the pleadings, except when his whole case is expressly or impliedly admitted. Hence if any material allegation of his complaint is denied by the answer, plaintiff must fail. *Bacon v. Cropsey*, 7 N. Y. 195. In this case plaintiff read the complaint and rested, just what was done in the case at bar. See, also, *Felch v. Beaudry*, 40 Cal. 439; *Widmer v. Martin*, 87 Cal. 88, 25 Pac. 264.

Affirmative matter constituting a complete defense is set up in the answer, which is duly verified. This precludes plaintiff's right to judgment on the pleadings. *Garvey v. Willis*, 50 Cal. 619; *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369.

"For the purpose of judgment on the pleadings, the averments of the answer are taken to be true." *Fleming v. Wells*, 65 Cal. 336, 4 Pac. 197, cited in *People v. Johnson*, 95 Cal. 471, 474, 31 Pac. 611.

A motion by plaintiff for judgment on the pleadings is in legal effect simply a demurrer to the answer. Therefore, if the answer contains any defense, either by way of traverse or confession and avoidance, the motion will be denied, and judgment will go against plaintiff, as was properly done in this case. *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. 671.

DAVIS, J.—On November 2, 1897, the appellant, J. H. Hampson, brought suit in the court below against the appellees, Berwill B. Adams, treasurer and *ex officio* tax-collector of Graham County, and William Burchfield, sheriff and *ex officio* assessor of said county, to enjoin the collection of certain taxes alleged to have been illegally assessed against him for the year 1897 upon personal property. The complaint avers: "That said plaintiff is, and has been for many years, a taxpayer in said county, and is the owner of a herd of stock cattle running on the range in said county; that the place where the herd runs is on Eagle Creek, in said county:

that the range is a rough and mountainous country, and it is impossible to know at any time the exact number of cattle in said herd, as it would be practically impossible to count the same; that the plaintiff, by his agent, E. A. Cutter, returned to the assessor of said county the number of cattle owned by plaintiff as stock cattle at ten thousand head; that this number was reached after careful investigation, and plaintiff believes and states the fact to be that on the very best information and belief this is a fair and just estimate of the number of cattle in said herd, and all the stock cattle owned by plaintiff in said county; and that the assessor of said county listed as his assessment of the stock cattle of the plaintiff in said county liable to taxation ten thousand head, and no more." The complaint then recites certain acts and proceedings of the board of supervisors of said county while sitting as a board of equalization, through which, it is alleged, there were entered upon the assessment-roll of said county, as the property of the appellant, additional stock cattle to the number of five thousand, thereby increasing his total assessment to fifteen thousand head. It is charged that the method pursued in making said addition was not in compliance with the statute. It is also alleged that the action of the board was not based upon information or evidence, but was taken arbitrarily, maliciously, fraudulently, through prejudice, and for the purpose of revenge. Relief by injunction was invoked by appellant to prevent the collection of taxes on his herd of stock cattle beyond the valuation of the ten thousand head so returned and listed by him as aforesaid. The answer filed on December 6, 1897, "denies that it is impossible to know the number of cattle owned by the plaintiff, or that it is or would be practically impossible to count the same, or that 10,000 head of cattle is a fair and just estimate of the number thereof, or that said number is all the cattle owned by the plaintiff in Graham County." The allegations of the complaint respecting the acts and proceedings of the board of equalization are severally denied, and the answer sets up a method of procedure on the part of said board and the assessor in the making of the addition of five thousand head of stock cattle to appellant's assessment which is in substantial compliance with the requirements of the statute. The allegation of fraud and misconduct in the

board's action is also specifically denied, and it is affirmatively alleged "that the amount of property assessed to the plaintiff is not in excess of the number and amount of property owned by the plaintiff within Graham County for the year 1897; and that the number of cattle, and the valuation thereof, as fixed, adjudged, and determined by the said board of equalization, is not in excess of the fair and just number and amount so owned by the plaintiff, as aforesaid, for the year 1897." The plaintiff, on December 10, 1897, amended his complaint by pleading full payment of all taxes assessed against him except those which were levied and based upon the added number of cattle. The complaint and answer were both duly verified. A temporary injunction was granted upon the filing of the original complaint. The record shows that on December 10, 1897, the temporary injunction was dissolved upon the denials of the answer and for want of equity in the complaint; that on the same day a motion by plaintiff that the injunction be made perpetual upon the complaint and answer was denied, and that thereupon the cause was submitted to the court upon the pleadings, without evidence, and judgment was rendered against the plaintiff, denying the relief sought.

The principal errors assigned by the appellant are, that the court erred (1) in dissolving the injunction, and (2) in not making the injunction perpetual. It is a general rule of equity practice that upon the coming in of an answer denying the equities of the bill the defendant is entitled to have the injunction dissolved. *Blum v. Loggins*, 53 Tex. 121; *Love v. Powell*, 67 Tex. 15, 2 S. W. 456; *Schæffler v. Schwartzing*, 17 Wis. 31; *Couch v. President, etc.*, 4 Johns. Ch. 26; *Hollister v. Barkley*, 9 N. H. 230. Where a motion to dissolve is heard upon the bill and answer, the responsive allegations of the latter must be taken to be true; and if the equity of the bill is sworn away, the injunction may be dissolved. *Webster v. Hardisty*, 28 Md. 592. Counsel for appellant have treated the answer in this case as a general denial, and have urged upon us the doctrine that a general denial is not good in chancery. The assumption as to the character of the answer is clearly erroneous, and the principle sought to be invoked is therefore inapplicable. If the dissolution of the preliminary injunction was not the plain duty

of the district court, it was an exercise of judicial discretion with which an appellate court would not interfere.

Did the court err in refusing a perpetual injunction on the final hearing? An injunction, being the "strong arm of equity," should never be granted unless the right seems clear. *Burnham v. Kempton*, 44 N. H. 92; *Bonaparte v. Railroad Co.*, 1 Baldw. 218, Fed. Cas. No. 1,617. For a perpetual injunction the courts require that there should be no doubt in the case, and that the plaintiff must make out a clear and unexceptionable right. Daniell's Chancery Pleading and Practice, 1681. As has been stated, the case at bar was submitted upon the pleadings, without evidence. The answer was responsive to, and expressly denied the material averments of, the complaint. The burden of proof was thus cast upon the plaintiff to establish the facts upon which his right to relief depended. Having failed to support by proof the allegations of his complaint, the court properly refused to grant a perpetual injunction. *Bressler v. McCune*, 56 Ill. 475; *Spangler v. City of Cleveland*, 43 Ohio St. 526, 3 N. E. 365. A discussion of the other questions sought to be raised might be pertinent had the case gone to trial upon the issues made by the pleadings, but we are not expected to declare the law applicable to facts which are controverted. We find in the record nothing which justifies us in disturbing the judgment of the lower court, and it is affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 669. Filed June 2, 1899.]

[57 Pac. 605.]

GEORGE H. N. LUHRS, Plaintiff and Appellant, v. WILLIAM A. HANCOCK et al., Defendants and Appellees.

1. HOMESTEAD—CONVEYANCE—BY HUSBAND TO WIFE—COMP. LAWS ARIZ. 1877, PAR. 2141, CONSTRUED.—Paragraph 2141, *supra*, providing that no alienation of a homestead by a married man shall be valid without the signature of the wife, acknowledged by her separately and apart from her husband, has no application to a conveyance of a homestead by a husband to his wife.

2. REAL PROPERTY—CONVEYANCE BY HUSBAND TO WIFE VALID—COMMON LAW—LAWS ARIZ. 1885, ACT NO. 68, CONSTRUED—COMP. LAWS ARIZ. 1877, PAR. 1960 ET SEQ., CITED.—Act No. 68, *supra*, adopting the common law so far as not inconsistent with the laws of the territory, etc., does not adopt the rule of common law as it prevailed when the wife was the mere chattel of the husband, that a deed between husband and wife was void, as that rule is inconsistent with paragraph 1960 et seq., *supra*, conferring enlarged and separate rights upon married women.
3. HOMESTEAD—FRAUDULENT CONVEYANCES—CONVEYANCE OF HOMESTEAD CANNOT BE ATTACKED AS FRAUDULENT—COMP. LAWS ARIZ. 1877, PAR. 2140, CITED.—The conveyance of a homestead, it being free from any claims of creditors, cannot be questioned by them as fraudulent. Paragraph 2140, *supra*, cited.
- AFFIRMED 181 U. S. 567, 45 L. Ed. 1005.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Hamilton & Armstrong, for Appellant.

C. F. Ainsworth, for Appellees.

“Property exempt from execution is not subject to any claim of the creditor, but is absolutely free from all claims of creditors. No execution or other writ is a lien upon it. The creditor has no claim upon it in any form, and it is impossible to conceive any logical ground upon which property not subject to the claims of creditors can be held to have been fraudulently conveyed.” *Blair v. Smith*, 114 Ind. 114, 5 Am. St. Rep. 593, 15 N. E. 817; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705; *Hickson v. George*, 18 Kan. 253; *Monroe v. May*, 9 Kan. 476; *Dreutzer v. Bell*, 11 Wis. 114; *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148, and note; *Cipperly v. Rhodes*, 53 Ill. 346; *Taylor v. Deusterberg*, 109 Ind. 165, 9 N. E. 907.

“A conveyance of a homestead cannot be in fraud of creditors.” *Patnode v. Darvau*, 112 Mich. 127, 71 N. W. 1095. See, also, *Bank of Commerce v. Fowler*, 93 Wis. 241, 67 N. W. 423; *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148, and note; *Hibben v. Soyer*, 33 Wis. 319; *Thompson v. Crane*, 73 Fed. 327; *Mundt v. Hagedorn*, 49 Neb. 409, 68 N. W. 610; *Mun-*

son v. Carter, 40 Neb. 417, 58 N. W. 931; *Merchants' Nat. Bank of Kansas City v. Kopplin*, 1 Kan. App. 599, 42 Pac. 263.

Exempt property may be transferred by the owner, even as a gift to his wife, free from any claims of his creditors. *Bailey v. Littell*, 34 Nev. 294, 53 Pac. 308; *Waugh v. Bridgeford*, 69 Iowa, 334, 28 N. W. 626; *Robb v. Brewer*, 60 Iowa, 539, 15 N. W. 420.

A conveyance by the husband to the wife of the homestead is valid though the wife does not join in the deed, notwithstanding that the statutes provide that all deeds must be executed by both husband and wife. *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. 715; *Stevens v. Castel*, 63 Mich. 111, 29 N. W. 828; *Lynch v. Doran*, 95 Mich. 395, 54 N. W. 882; *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441; *Riehl v. Bingenheimer*, 28 Wis. 84.

DAVIS, J.—This was an action by the appellant to recover the possession of five certain lots in the city of Phoenix, and for the value of the rents and profits thereof. The complaint is in the usual form in ejectment cases. The defendants William A. Hancock and Lilly B. Hancock, husband and wife, answered, pleading "Not guilty," and setting up the statute of limitations in bar of plaintiff's right to recovery. Similar defenses were interposed by the defendant Thomas W. Pemberton, who, by way of cross-complaint, also pleaded his ownership and possession of said premises, and asked for affirmative relief as against the adverse claims of the plaintiff. Upon the trial in the court below, the plaintiff was adjudged to have no right, title, or interest in said property, and the defendant Pemberton was adjudged to be the owner and entitled to the possession thereof. From this judgment of the district court the plaintiff prosecutes an appeal.

The record shows the material facts in the case to be substantially as follows: On February 27, 1886, the legal title to the premises in controversy was vested in William A. Hancock, the common source from which both the plaintiff and the defendant Pemberton derive title. The said premises were inclosed as one tract, with a dwelling-house situated upon lots 14 and 15, and had been occupied by the defendants William A. Hancock and Lilly B. Hancock as a homestead

ever since 1873. On the said twenty-seventh day of February, 1886, and while the said premises were so occupied and claimed as a homestead, the said William A. Hancock, for the consideration of love and affection, deeded the same by a direct conveyance to his said wife, Lilly B. Hancock. The value of the said property so conveyed did not at that time exceed the sum of four thousand dollars. On March 5, 1892, certain creditors (Herrick & Luhrs) obtained a judgment in the district court of Maricopa County against the said William A. Hancock for the sum of \$2,524.02, upon an indebtedness contracted by him November 1, 1883. An execution was issued upon said judgment April 5, 1892, and the same was levied upon the premises here in controversy, as the property of William A. Hancock. No proceeding was had to set aside the anterior conveyance to his wife, but the said real estate was formally sold under said execution to the plaintiff, George H. N. Luhrs, to whom a sheriff's deed was made on February 4, 1893, conveying the title which is the basis of his ejectment suit. On March 21, 1892, the said Lilly B. Hancock and William A. Hancock had borrowed from one Robert Allstatter the sum of twenty-six hundred dollars, and on the same day, to secure the payment thereof, had executed to the said Allstatter a mortgage upon all of the aforesaid premises. This mortgage, presumably executed in good faith, was subsequently foreclosed, and the defendant Thomas W. Pemberton became the purchaser at the foreclosure sale. He received the sheriff's deed for the said premises on February 14, 1895, took possession thereof from the Hancocks, and has since paid the taxes and made valuable improvements upon the property. The plaintiff, Luhrs, was never in the possession of the premises.

Several propositions of error are assigned, but, as we view it, the case turns wholly upon the question of the validity and effect of the deed of William A. Hancock to Lilly B. Hancock, executed February 27, 1886. If by that conveyance there was effected a transfer of the legal title to this real estate, then the appellant, claiming solely under an execution sale upon a judgment against William A. Hancock, must fail. Hence it is essential to a reversal that the appellant establish the invalidity of this conveyance. He attempts to do so, and upon three different grounds.

It is first insisted that the deed from Hancock to his wife was ineffectual to pass title to the homestead, because it was not signed and acknowledged by the wife, and therefore not in compliance with the statute in force at the time (Comp. Laws, par. 2141), which prescribed that "no mortgage, sale or alienation of any kind whatever of such land [homestead] by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband." The policy of statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife, and to enable her to protect the family, in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance. Thompson on Homesteads and Executions, sec. 473. Under statutes similar to this of Arizona, it has been held that a conveyance of the homestead to the wife by the husband is not within the meaning of the statute, and is valid, although the wife does not join. *Lynch v. Doran*, 95 Mich. 395, 54 N. W. 882; *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441; *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. 715; *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208; *Albright v. Albright*, 70 Wis. 528, 36 N. W. 254. We adopt this construction as the true meaning and spirit of the law, in preference to the more rigid and literal interpretation adhered to in the Illinois cases cited by counsel for the appellant. It would be a foolish and senseless act for the wife to join in a conveyance to herself, and we cannot think the statute contemplates any such absurd requirement. The deed to Mrs. Hancock from her husband was clearly not in derogation of her homestead rights, nor could it impair or affect the homestead, since the joint act of both would still be required for its alienation or encumbrance to a third person. Comp. Laws, par. 1972.

Again, it is urged that by act No. 68, Sessions Laws 1885, the common law was in force in this territory when the conveyance was made, and that at common law a deed between husband and wife was void. The enactment relied upon to

support this proposition is as follows: "The common law of England so far as it is consistent with and adapted to the natural and physical conditions of this territory and the necessities of the people thereof, and not repugnant to, or inconsistent with, the constitution of the United States, or bill of rights, or laws of this territory, or established customs of the people of this territory, is hereby adopted and shall be the rule of decision in all the courts of the territory." It is here plainly apparent that the legislative will was not to adopt the common law as it prevailed when the wife was the mere chattel of the husband. The old common-law rule, based upon the unity of the husband and wife, which restricted transactions between them, has been practically abrogated in this country by statutes conferring enlarged and separate rights upon married women, and is inconsistent with the legislation of this territory upon the subject as it existed when this conveyance was made. Comp. Laws, par. 1960 et seq. In the case of *Jones v. Clifton*, 101 U. S. 225, Mr. Justice Field, delivering the opinion of the court, said: "The technical reasons of the common law, arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the property conveyed may be held as her separate estate beyond the control or interference of her husband, though formerly held to be indispensable, is no longer required." The fact that the deed in this case was made by Hancock directly to his wife is not sufficient, in our judgment, to warrant us in holding the instrument to be invalid.

But it is finally asserted that the conveyance was in fraud of the rights of appellant as a creditor of William A. Hancock, and therefore void for this reason. The property was at the time the homestead of the Hancocks. Such was the finding of the trial court, based upon ample evidence. The character of the homestead exemption, as defined by the statute then in force, was as follows: "The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances and the water-rights and privileges pertaining thereto, sufficient to irrigate the land, not

exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale or execution, or any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this act, or if contracted or incurred at any time in any other place than in this territory." Comp. Laws, par. 2140. As will be seen, this law effectually excluded the homestead from all remedies of creditors in all courts. No execution or other writ could be made a lien against it, nor could the creditor have a claim upon it in any form. Under such circumstances, could the homestead be the subject of a fraudulent conveyance? The whole doctrine of annulling fraudulent conveyances rests upon the ground that the creditor has a right to resort to the property, and where he has no such right it is impossible that a conveyance can be deemed fraudulent. Surely a creditor cannot, in legal contemplation, be defrauded through a conveyance made by his debtor of property which the creditor has no right by law to appropriate, or even touch, by any civil process. Bump, in his work on Fraudulent Conveyances, says: "Property which is exempt by a positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation. The creditors cannot be said to be creditors as to that particular property, so as to make a transfer of it a matter of concern to them." The same principle is stated by Mr. Justice Paine in *Pike v. Miles*, 23 Wis. 164, 19 Am. Dec. 148, and note, when, in considering the effect of a conveyance by the husband to his wife of the homestead, he says that such a "conveyance cannot be held fraudulent as to creditors, for the reason that, being exempt, it was no more beyond their reach after the conveyance than before." In *Wilson v. Taylor*, 49 Kan. 774, 31 Pac. 697, it was declared that "a conveyance of a homestead or other exempt property, even though made with intent to defraud creditors, vests the title thereof in the grantee, and does not become subject to the lien of a judgment previously obtained by a creditor of the grantor." In fact, the principle that a homestead cannot be made the subject of a fraudulent conveyance is well sustained by the authorities. *Derby v. Weyrich*, 8 Neb. 174, 30 Am. Rep. 827; *Carhart v. Harshaw*, 45 Wis. 340, 30 Am. Rep. 752; *Blair v. Smith*, 114 Ind. 114, 5 Am. St. Rep. 593, 15

N. E. 817; *Buckley v. Wheeler*, 52 Mich. 1, 17 N. W. 216; *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 3 Am. St. Rep. 290; 36 N. W. 139; *Hixon v. George*, 18 Kan. 253; *Roser v. Bank*, 56 Kan. 129, 42 Pac. 341; *Thomson v. Crane*, 73 Fed. 327; *Cipperly v. Rhodes*, 53 Ill. 346. Moreover, the record shows that no proceeding was ever brought to set aside as fraudulent the conveyance from Hancock to his wife, and no execution was levied under the judgment against him until after the lien of the Allstatter mortgage had attached, through which the defendant Pemberton derived title.

We conclude, therefore, that the deed from the husband vested in Lilly B. Hancock the title to the premises in controversy in this case, and that no interest passed to the appellant by virtue of the attempted execution and sale of said premises as the property of William A. Hancock. Our conclusion upon this point is decisive against the appellant, and renders it unnecessary to notice the other questions sought to be raised. The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

Street, C. J., did not sit in the hearing of this case.

[Civil No. 670. Filed June 2, 1899.]

[57 Pac. 610.]

EVERETT SPICER, Plaintiff and Appellant, v. **JAMES T. SIMMS et al.**, Defendants and Appellees.

- 1. APPEAL AND ERROR—APPEALABLE ORDERS—FINAL JUDGMENT—REV. STATS. ARIZ, 1887, PARS. 593, 846, CONSTRUED—HISTORY CO. v. DOUGHERTY, 3 ARIZ. 387, 29 PAC. 649, AND BOGAN v. PIGNATARO, 3 ARIZ. 383, 29 PAC. 652, CITED—CANADA DEL ORO MINES v. COLLINS, 4 ARIZ. 163, 36 PAC. 33, LIMITED.—**Paragraph 593, *supra*, giving the supreme court jurisdiction to review on appeal an order granting or refusing a new trial, and similar orders, is to be construed *in pari materia* with paragraph 846, *supra*, providing that an appeal or writ of error may be taken from any final judgment in civil cases. Therefore, the only appeal allowed is from a final judgment, and no order of the district court, except it be in the

nature of a final judgment, is appealable. *History Co. v. Dougherty*, and *Bogan v. Pignataro*, *supra*, cited. *Cañada del Oro Mines v. Collins*, *supra*, limited.

2. SAME—SAME—ORDER SETTING ASIDE JUDGMENT AND GRANTING NEW TRIAL NOT APPEALABLE.—An order setting aside a judgment and granting a new trial is not such a final order as is appealable.
3. TRIAL—MOTION TO SET ASIDE JUDGMENT AND FOR NEW TRIAL—POWER OF COURT TO GRANT MOTION DURING TERM WHERE MOTION IS NOT FILED DURING TIME PROVIDED BY STATUTE—REV. STATS. ARIZ. 1887, PAR. 836, CONSTRUED.—Courts possess unlimited power over their own orders and judgments during the term at which rendered, and a court has power during the term to grant a motion to set aside a judgment and grant a new trial, filed three days after the rendition of the judgment, notwithstanding paragraph 836, *supra*, provides that "all motions for new trials, in arrest of judgment or to set aside a judgment, shall be made within two days after the rendition of the verdict or judgment, if the term of court shall continue so long."

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Dismissed.

The facts are stated in the opinion.

Hamilton & Armstrong, for Appellant.

C. F. Ainsworth, for Appellees.

DAVIS, J.—On April 2, 1898, the court below rendered a judgment and decree in this cause in favor of the appellant, the plaintiff therein. A motion for a new trial was not filed until three days thereafter. On July 2, 1898, and at the same term of the district court, the motion was granted and the judgment set aside. Subsequently, on appellees' motion, an attachment which had been issued in appellant's behalf, was dissolved. The appeal is taken from the order of the district court granting a new trial, and also from the order dissolving the attachment. Our jurisdiction to review the case is challenged on the ground that neither of these orders is appealable. The right to an appeal depends entirely upon the statute. If the statute does not confer it, it does not exist. The appellant bases his right of appeal in this case mainly upon paragraph 593 of the Revised Statutes, which is as fol-

lows: "The supreme court shall have jurisdiction to review upon appeal, or other proceedings provided by law, (1) a judgment in an action or proceeding commenced in the district courts, when the matter in dispute exceeds two hundred dollars, or when the possession of land or tenements is in controversy, or brought into that court from another court; and to review, upon appeal from such judgment, any intermediate order involving the merits and necessarily affecting the judgment; (2) an order, granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or proceeding." This provision of the statute is contained under title 14 ("Courts of Justice and Judicial Officers"). It relates to the jurisdiction of the supreme court, and to the matters which are reviewable by that tribunal when brought to it in the manner provided by law. The method of taking cases to the supreme court is prescribed in chapter 20, title 15 ("Civil Procedure"), and the acts of the seventeenth and nineteenth legislative assemblies amendatory thereof. This chapter begins with paragraph 846, which is as follows: "An appeal or writ of error may be taken to the supreme court from any final judgment of the district court rendered in civil cases." Concerning the mode of perfecting an appeal, paragraph 849 provides: "An appeal may, in cases where an appeal is allowed, be taken during the term of the court at which the final judgment is rendered by the appellants giving notice of appeal," etc. By paragraph 875 it is required that "the transcript shall in all cases contain a copy of the final judgment, notice of appeal," etc. Neither in this chapter nor in the amendments is there any provision authorizing an appeal to the supreme court except from a final judgment of the district court. In *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649, the court construed paragraphs 593 and 846 *in pari materia*, as follows: "Our construction of the statute on the subject of appeals, then, is that an appeal from the final judgment of the district court in all civil cases is allowed; that, upon such appeal from a final judgment, this court may review any intermediate order involving the merits, and necessarily affecting the judgment,—orders granting or refusing new trials, sustaining or overruling demurrers, or affecting any substantial rights of the parties,—and may render such judgment or make such

order therein as may be proper to save the rights of the parties." In *Bogan v. Pignataro*, 3 Ariz. 383, 29 Pac. 652, which was an appeal from an order of the court below dissolving a temporary restraining order, the supreme court reiterated its former holding, and said: "In the case of *History Co. v. Dougherty*, decided at this term, we held that this court has appellate jurisdiction in appeals from final judgments. The order here appealed from is not a final judgment; hence this court has no jurisdiction, and the appeal is dismissed." In a more recent decision the case of *History Co. v. Dougherty* has been disapproved, but, as examination will show, only for the purpose of placing a limitation upon the right of appeal from final judgments. Paragraph 846 was held to give the right of appeal only in cases within the jurisdiction of the supreme court, and an appeal was dismissed by the court because the amount in dispute, as shown by the judgment, was not within its jurisdiction. *Cañada del Oro Mines v. Collins*, 4 Ariz. 163, 36 Pac. 33. Upon a full consideration of our statutes on the subject, we are led to the conclusion that the only appeal which they contemplate is from a final judgment, and that no order of the district court is appealable, except it be in the nature of a final judgment.

The question then remaining to be considered is whether or not the order setting aside the judgment and granting a new trial is a final judgment, for the determination of this point will also be decisive of our right to review the court's action in dissolving the attachment. If the court had no power to make the order at the time it was made, the judgment rendered would be void, and an appeal would lie to review it. *Trullenger v. Todd*, 5 Or. 36; *Deering v. Creighton*, 26 Or. 556, 38 Pac. 710. Mr. Chief Justice Fuller, in *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. 582, in commenting upon an order of the court vacating a judgment, said: "The question involved is one of power; for, if the court had power to make the order when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable." It is contended by counsel for the appellant in this case that the court below was

without power to set aside its judgment and grant a new trial upon a motion that was filed three days after the rendition of the judgment. Our statute provides, it is true, that "all motions for new trials, in arrest of judgment or to set aside a judgment, shall be made within two days after the rendition of the verdict or judgment, if the term of court shall continue so long." Par. 836. This statute, however, comes to us from Texas, and the supreme court of that state, passing upon a similar question, said: "It does not necessarily follow that the new trial was improperly granted because the motion for the new trial was not made until more than two days after verdict, because facts might have existed that would have made it proper for the court to grant the new trial, although the motion was not made until more than two days after verdict." *Wells v. Melville*, 25 Tex. 337. And, independently of this construction, it is a rule generally recognized by appellate tribunals that courts possess an unlimited power over their own judgments and orders, in respect to their vacation and modification, until the close of the term at which they are rendered. Freeman on Judgments, sec. 90. We conclude, therefore, that the court below had full power to set aside its judgment and award a new trial, that the order so made was not a final judgment, that the action is still pending and undetermined in the lower court, and that this appeal should be dismissed. The motion is accordingly granted.

Doan, J., and Sloan, J., concur.

[Civil No. 658. Filed June 2, 1899.]

[57 Pac. 622.]

C. A. STEVENS et al., Defendants and Appellants, v.
ABBIE E. WADLEIGH, Plaintiff and Appellee.

1. LANDLORD AND TENANT—LEASE—IRRIGATION—FAILURE TO DELIVER WATER—DEFENSE.—An answer, in an action for rent, based upon a lease of land and water-rights, with covenants for peaceable possession, setting up that the right to the use of water was a

material part of the lease, and that plaintiff had failed and refused to deliver the water, is insufficient, without an allegation that the lessor agreed or bound himself to deliver the water, or that he failed in his title to the water, or to defend the lessee in the right, under the agreement, to the use of water for irrigation purposes.

2. SURETIES — CONTRACTS — REFORMATION — INNOCENT PURCHASERS.—

Where sureties upon a bond to secure payment of rent admitted that they signed the bond knowing the contents thereof, and that they permitted it to remain unchanged until after the property and bond were sold to an innocent purchaser, and conceded that under the terms thereof they were liable for the rent to the amount of the bond, they will not be permitted, as against the interests of the purchaser, to have the bond reformed so as to limit their responsibility to guaranteeing the payment of rent to the amount expressed in the bond.

3. JUDGMENTS—DIFFERENT CAUSE OF ACTION—CONCLUSIVENESS.—

A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties, or their privies, though the second suit be for a different cause of action, so long as the judgment in the first suit remains unmodified.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, for Appellants.

Frank H. Hereford, for Appellee.

DOAN, J.—On the eighteenth day of April, 1890, one G. H. Wadleigh, in Tucson, Pima County, Arizona, by a written agreement duly executed, leased certain real and personal property to C. A. Stevens, a defendant and one of the appellants in this case, for the term of five years, at an agreed rental of three thousand dollars, to be paid in installments at the rate of fifty dollars per month during the continuance of the lease, and agreed and bound himself, his executors and assigns, to warrant and defend the said lessee in the peaceable and quiet possession of the said premises and property, and every part thereof, during the term of said lease, and in

default thereof bound himself and assigns to the said lessee or assigns in all damages that the said lessee should sustain by said failure to defend and warrant the said lessee, not exceeding the sum of fifteen hundred dollars. At the same time and place the said defendant C. A. Stevens, as principal, and A. V. Grosetta and W. S. Read, co-defendants, and appellants herein, as sureties, executed and delivered to the said G. H. Wadleigh a joint and several bond in the sum of fifteen hundred dollars, conditioned, among other matters, that "if the said Stevens shall well and truly pay, or cause to be paid, said rent, and perform all the other conditions of said lease therein agreed to be performed by him, then this obligation shall be null and void; otherwise, to remain in full force and effect to the full extent of the damage sustained by said G. H. Wadleigh, not to exceed fifteen hundred dollars." Stevens entered upon the premises, took possession of the real and personal property, occupied and paid rent for the same up to and until the first day of March, 1893, since which date the defendant Stevens, and his sureties, Grosetta and Read, failed and refused to pay the rent due upon the said leased property, or any part thereof. After the execution and delivery of the lease and bond above mentioned, the said G. H. Wadleigh, on the twenty-fifth day of February, 1893, sold and transferred the real and personal property in question, and the said agreement of lease, and bond as security for the same, to Abbie E. Wadleigh, this plaintiff, for a valuable consideration. On the twenty-fourth day of April, 1895, Abbie E. Wadleigh (the appellant herein) recovered a judgment against the defendants, and each of them, for the sum of six hundred and fifty dollars for rent upon the said property from the said first day of March, 1893, to the first day of April, 1894. The rent accruing and remaining unpaid from that date, the plaintiff herein, on May 27, 1895, brought suit in the district court for the sum of six hundred and fifty dollars for rent upon the said property from the said first day of April, 1894, to the first day of May, 1895, the complaint alleging that at the time of bringing this action the plaintiff was the owner, by purchase for a valuable consideration, of said real and personal property, the agreement of lease, bond, and claim for rent; notice of which was duly given the defendant, setting up the former default, refusal

to pay, suit and recovery of the aforesaid six hundred and fifty dollars, alleging the further default and refusal to pay, and setting up the lease and bond. To the complaint the defendants answered, and set up two defenses. The first defense alleges that the lessee, at the time the lease and bond were executed, was in the dairy business; was the owner of a large number of milch cows; that his business was large and profitable, which the lessor then knew; that the land leased is arid, and, without irrigation, is valueless for any purpose; that, if irrigated, large and profitable crops can be grown on it; that the only value of the land was the crops it could be made to produce by irrigation; that the land was under an irrigating ditch that diverted water from the Santa Cruz River; that said ditch was owned by the owners of the land lying under it, each of which owners owned a share therein; that at the time the lease was made the lessor was such an owner; that a right to the use of a share of said water, amply sufficient to irrigate the land, was appurtenant to said land, and a material part thereof, and a consideration, in part, of said lease; that for a long time before the lease was made, and for some time thereafter, said water was used on said land, whereby the same was made valuable as aforesaid; that the lease was made in order that the lessee might provide himself with feed for the cows aforesaid; that the lease contemplated that the lessee should have a right to the use of the said water upon the said land for the purposes aforesaid, and that the guaranty of the lessor, contained in the lease, extended to the uninterrupted use and enjoyment of the right to said water during the time the lease should run; that during a part of the term the lessor delivered to the land the water to which it was entitled, and that during all that time the lessee paid the rent in full; that afterwards, while the lease was in force, the lessor failed and refused to deliver said water wherewith to irrigate the said land; that because of said failure the land was worthless, and the lessee was unable to raise feed for his cows thereon, and did abandon the leased premises. The second defense alleged that in pursuance of the lease, and in order to effectuate the same, the defendant executed to the lessor the bond conditioned in the following words, to wit: "Now, therefore, if the above bounden C. A. Stevens shall well and truly pay, or cause to be paid, the said

rent, and perform all the other conditions of said lease therein agreed to be performed by him, then this obligation to be null and void; otherwise, to remain in full force and effect to the full extent of the damage sustained by G. H. Wadleigh, not to exceed fifteen hundred dollars." They further alleged that at the time of making the bond and lease it was agreed by and between the lessor and the defendants Grosetta and Read that they, the said Grosetta and Read, should in due and proper form guaranty to the lessor and his assigns that the said Stevens should pay to the said lessor or his assigns fifteen hundred dollars of the three thousand dollars therein covenanted to be paid, but that their said guaranty should only bind them, the said defendants, to said guaranty that Stevens would pay rent under the covenant, as in the lease contained, to the extent of fifteen hundred dollars, and no more, and that, as soon as Stevens had paid of said rental the sum of fifteen hundred dollars, then and henceforth the said Grosetta and Read were to be released, and thereafter discharged from any liability to said lessor and his assigns on account of said guaranty; that in pursuance of said agreement so made between them as aforesaid, and relying thereon, the sureties executed the bond; that thereafter, and since the inception of this suit, said defendants have been advised by the court that, said above-quoted words from the said bond did not correctly state the verbal agreement as above given, but, on the contrary, that the legal force of said words was to make said Grosetta and Read liable for any balance that said Stevens might owe on said rental to the extent of fifteen hundred dollars, regardless of the amount said Stevens might have paid thereon. Wherefore said defendants pray that said bond be reformed, and in such a way that it will correctly state and show the agreement that was made by and between the said parties as aforesaid. Defendants allege that said Stevens has paid out of said rental more than fifteen hundred dollars,—viz., the amount of twenty-six hundred dollars,—the sum so paid being the rent for the full period of four years. To these defenses the plaintiff demurred upon the grounds that they failed to state facts sufficient to constitute any defense to the cause of action set up in the complaint. The demurrer was sustained by the court. The defendants stood by their pleading. Upon the

trial of the case, judgment was rendered against them for the rent. From that judgment an appeal was taken to this court. The appellants assign as error the following: "1. The court erred in sustaining the demurrer to the first defense above specified, and for the reason that the same is good in law; 2. That the court erred in sustaining the demurrer to the second defense above specified, and for the reason that the same is good in law."

The pleadings allege that Stevens and his sureties, Grosetta and Read, failed to pay the rent due upon the leased property from March 1, 1893, to April 1, 1894; that the appellee herein brought suit and recovered a judgment against the defendants, and each of them, for the sum of six hundred and fifty dollars for rent upon the said property from the said March 1, 1893, to April 1, 1894. Among the agreed facts filed with the exhibits and other evidence in the case is the agreement "that the lease and bond were executed, as alleged, and duly assigned to the plaintiff, as alleged; that the defendant Stevens paid the rent in full, as provided in the lease, to the first day of March, 1893; that afterwards, in this court, judgment was obtained against these defendants and in favor of this plaintiff for six hundred and fifty dollars, it being the said rent from the said March 1, 1893, to April 1, 1894, and the defendants have paid no rent since April 1, 1894." In his argument in support of the first assignment of error, the counsel for the appellants says that a former case between the same parties, involving this question, was before this court, and quotes from the decision rendered by this court in that case, "We further hold that Stevens could not, under the terms of said lease, abandon said lands, and escape the liability for the rent," upon the theory that "a judgment by a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties." *Morgan v. Mitchell*, (Neb.), 72 N. W. 1055. We quote further from the decision of this court affirming the judgment of the district court of Pima County in the case referred to, remembering that the suit was between the same parties, and that identically the same issues were before the court in that case as in this case, the action then having been brought for the rent from March 1, 1893, to April 1, 1894,

while this is brought for the rent from April 1, 1894, to May 1, 1895; the first defense (herein demurred to) having been then set up in the same shape as herein. The court said (5 Ariz. 90, 46 Pac. 70), after stating the facts: "There was no evidence that plaintiff or her assignors had performed any act or neglected any duty which caused the injury to the said ditch, or diminished the quantity of water to which the land leased to the defendant Stevens was entitled. Under the allegations in the pleadings, the terms of the lease, and the facts adduced on the trial, we hold that the lease carried with it, for the term of the lease, all the water which could be obtained from the Farmer's ditch, and that the lessee, by the terms of the lease, had for that period the same rights which the lessor would have had, and was under the same obligations to pay for the use and distribution of the water and to maintain said ditch for that period as the lessor would have been had he remained in possession,—i. e. that the lessee for that period succeeded to all the rights and obligations that would have belonged to and rested upon the lessor had he remained in possession; that for the period of the lease said interest in the water of said ditch attached to the lands, whether it be under the name of an 'appurtenance' or under some other name or appellation. The part of the lease quoted was only a covenant of quiet enjoyment of the lands leased, since there was no eviction. The said covenant was to the extent only that the lessor had a good title, and could give a free, unencumbered lease for the time specified. 1 Washburn on Real Property, p. 428, par. 2a; *Gazzolo v. Chambers*, 73 Ill. 75. Aside from an expressed covenant to that effect, a landholder is not bound to keep the leased premises in repair, nor is he responsible for any damages to his tenant for injuries resulting to the latter from the non-repair of the leased premises. *Ward v. Fagin*, 101 Mo. 669, 20 Am. St. Rep. 650, 14 S. W. 738; *Peterson v. Smart*, 70 Mo. 38; *Brewster v. De Fremery*, 33 Cal. 341. And a loss, by accident, of a portion of the leased premises, does not rescind the lease, or relieve the tenant of his obligation to pay the rent. *Ely v. Ely*, 80 Ill. 532; *Sheets v. Solden*, 7 Wall. 416. We further hold that Stevens could not, under the terms of said lease, abandon said lands, and escape the liability for the rent." *Stevens v. Wadleigh*, 5 Ariz. 90, 46 Pac. 70. The answer nowhere

alleges that the lessor agreed or bound himself to deliver the water, neither does it allege that the lessor failed in his title to the water-right, or to invest and defend in the lessee the right, under the agreement, to the use of the water for irrigating purposes. Without either of these allegations, the allegations contained in the answer were insufficient to constitute any defense, and the demurrer was properly sustained.

The second defense alleged that a certain understanding or agreement had been made between the lessor and sureties on the bond, and that thereafter, in pursuance of such agreement, the bond was executed in the words and terms set forth in the pleading; and the defendants, while they alleged that the bond as drawn and signed did not express their understanding, yet admitted that they did sign the bond in the words and terms given, knowing it to be in such words and terms, and admitted that they allowed it to remain in such words and terms, thus signed by them, until after the property was sold to an innocent purchaser, and the lease transferred, and the bond assigned for value to the plaintiff in this case, and they admitted that the construction given the bond by the court is the proper construction of the words used. The plaintiff in this case is a third party to the contract of guaranty in the bond, and the record shows no right in any of the defendants to reform that contract as against her interests. 15 Am. & Eng. Ency. of Law, p. 679, note 3; 1 Story's Equity Jurisprudence, pars. 108, 139, 165, 434; 2 Pomeroy's Equity Jurisprudence, pars. 776 et seq.; *Cottrell v. Bank*, 53 Minn. 201, 54 N. W. 1111; *Toll v. Davenport*, 74 Mich. 386, 42 N. W. 63. It is conceded in the pleadings that under the existing terms of the bond Grosetta and Read are liable for the rent sued for. The prayer for a reformation of the bond therefore concedes that the facts alleged constituted no existing defense against the plaintiff, and the demurrer was therefore properly sustained by the lower court.

Beyond the fact that as a matter of law the court properly overruled the demurrer to the two defenses, remains the further fact that, regardless of the authorities that support the court's ruling in these instances, according to the general principles of law, "a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in

a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified." *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18. The judgment of the district court is therefore affirmed.

Street, C. J., and Sloan, J., concur.

[Civil No. 668. Filed June 2, 1899.]

[57 Pac. 614.]

J. E. WALKER, Assignee of the Hartford Banking Company, Plaintiff and Appellant, v. C. H. GRAY, Defendant and Appellee.

1. **APPEAL AND ERROR—EVIDENCE—OBJECTIONS TO—NOT WITHIN ISSUES—NOT RAISED BY GENERAL OBJECTION—STIPULATIONS—WAIVER OF OBJECTION—PLEADINGS—SUFFICIENCY—VARIANCE.**—In an injunction case brought by appellee against appellant, counsel for appellant objected to the admission of certain testimony on the ground that it was "immaterial, irrelevant, and incompetent." The question that no issue was made by the pleadings which rendered the testimony admissible was not raised. At the close of the injunction case, counsel for appellant stipulated in open court that said testimony, in so far as applicable, should be considered by the court and taken as proof in a second case brought by appellant against appellee from the judgment in which this appeal is taken. The record does not show that the court in ruling upon the objections made in the injunction case did so with reference to the state of the pleadings in this case, and appellant, having failed to save an exception to the admission of testimony given in the former case relating to the subject-matter of this action on the ground of insufficient allegations in the pleadings, should have, as a part of his stipulation, raised the point, and not waited until after the court's decision. Had the pleading been so defective as not to support a judgment, no objection or exception thereto was necessary to save the point. An inspection shows, however, that it is sufficient in this respect, no matter how great the variance between the allegations and proof may have been, as it clearly states a cause of action.

2. EVIDENCE—NEGOTIABLE INSTRUMENT—MUTUAL ACCOUNTS—SETTLEMENT—GIVING NOTE PRIMA FACIE EVIDENCE ONLY.—The giving of a note where there are mutual accounts between the maker and payee is not conclusive evidence that the maker was actually indebted to the payee in the amount mentioned therein, as a result of a complete and full settlement of mutual accounts, but only raises a presumption of this fact, which may be overturned by competent evidence.
3. NEW TRIAL—GROUNDS—SURPRISE—DILIGENCE—TAKING CHANCES ON JUDGMENT—WHEN AVAILABLE.—Surprise which is the result of no lack of diligence, and which operates to the prejudice of the party surprised upon the trial, and prevents his obtaining evidence material and competent, is a good ground for the granting of a new trial. The party affected, however, must first have exhausted all his other remedies before he is entitled to a new trial. He will not be permitted to take his chances of obtaining a verdict or decision, and to then for the first time avail himself of the point on motion for a new trial.
4. SAME—SAME—SAME—RECORD REVIEWED AND HELD NOT TO WARRANT NEW TRIAL.—Where the record shows that the testimony claimed to be a surprise was given at the commencement of the first trial, which lasted thirteen days; that no application was made therein for a continuance to meet the testimony; that at the close of the testimony no application was made for a postponement of the second case, nor suggestion made that additional witnesses, not present, were required to meet the same; that appellant willingly entered upon the trial of the second cause under a stipulation that the proof in the first case should be the proof in the second, and allowed it to go to judgment, having lost, he will not be heard to complain because of insufficient preparation; and an application for a new trial of the second case, upon the ground of surprise, is properly denied.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

W. H. Stilwell, C. F. Ainsworth, and Kibbey & Edwards, for Appellants.

When there are mutual accounts between parties, the giving of a note, or notes, by one to the other is *prima facie* evidence of the settlement of the accounts between them, and is, in the absence of fraud, conclusive evidence that the amounts for which such notes are given was at the time of

making actually owing from the maker of such notes to the payee mentioned therein. *Kinman v. Cannefax*, 34 Mo. 147; *De Frest v. Bloomingdale*, 5 Denio, 304; *Dutcher v. Porter*, 63 Barb. 15; *Lake v. Tyson*, 6 N. Y. 642; *Sperry v. Miller*, 16 N. Y. 407; *Sprague v. Harmon*, 82 N. Y. 466; *Cotherman v. Cotherman*, 58 Mich. 465, 25 N. W. 467; *Campbell Printing Co. v. Yorkton*, 11 Misc. 340, 32 N. Y. Supp. 263.

When the verdict is against the weight of the evidence it is the duty of the trial court to set it aside and grant a new trial. *Wells & French v. Novak*, 73 Ill. App. 403.

Newly discovered evidence as ground for a new trial must be such as probably would have produced a different verdict had it been introduced. *Freeman v. Hutchinson*, 15 Ind. App. 639, 43 N. E. 16; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233; *City of Paris v. Morrell*, 52 Ill. App. 121; *Peyser v. Coney Island etc. Co.*, 81 Hun, 70, 30 N. Y. Supp. 610.

A new trial should be granted for material evidence discovered after the trial, failure to discover it sooner being due to no negligence of the party. *Standard Life etc. Ins. Co. v. Askew*, 11 Tex. Civ. App. 59, 32 S. W. 31; *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953; *Baumgartner v. Hoffman*, 9 Utah, 338, 34 Pac. 294; *Heintz v. Cooper*, 104 Cal. 668, 38 Pac. 511; *Grogan v. Chesapeake etc. R. R.*, 39 W. Va. 415, 19 S. E. 563; *Atlanta Cons. St. Ry. Co. v. Beauchamp*, 93 Ga. 6, 19 S. E. 24; *Andrews v. Mitchell*, 92 Ga. 629, 18 S. E. 1017; *Lafond v. Smith*, 8 Wash. 26, 35 Pac. 404.

Even on conflicting evidence, there is no abuse of discretion in granting a new trial, where the evidence is conflicting and the plaintiff alleges newly discovered evidence. *Dougherty v. Lewis*, 92 Ga. 573, 17 S. E. 913.

To entitle a party to a new trial, on the ground of after-discovered evidence, the court must be satisfied: 1. That the existence of such evidence came to the knowledge of the party since the trial; 2. That it was not owing to want of due diligence that it did not come to his knowledge sooner; and 3. That if a new trial was granted a different verdict would probably be rendered. *Taylor v. Lyon Lumber Co.*, 13 Pa. Co. R. 235.

Motions for new trials involve the inquiry whether or not substantial justice has been done. *Volkommer v. Nassau Elec. R. Co.*, 23 App. Div. 88, 48 N. Y. Supp. 372.

Where the newly discovered testimony goes to the foundation of plaintiff's claim it cannot be considered as merely cumulative. *Berberich v. Louisville Bridge Co.*, 20 Ky. Law Rep. 467, 46 S. W. 691.

If the newly discovered evidence is sufficient to render a different verdict probable, a new trial may be granted. *Smith v. Matthews*, 21 Misc. 150, 47 N. Y. Supp. 96.

Newly discovered evidence which relates to distinct facts of a character different from that offered at the trial, though tending to establish the same ground of claim or defense, is not cumulative. *Keeler v. Jacobs*, 87 Wis. 545, 58 N. W. 1107; *Kline v. Gibson*, 8 Ky. Law Rep. 343, 2 S. W. 116; *Hiburn v. Harris*, 2 Tex. Civ. App. 395, 21 S. W. 572.

Joseph Campbell, and Millay & Bennett, for Appellee.

Where there is evidence to sustain the decision of the trial court the judgment will be affirmed, although the appellate court might have found otherwise if sitting as a trial court. *Barry v. Coughlin*, 90 Cal. 220, 27 Pac. 197.

If the testimony of the appellee is believed, he was entitled to recover. It was given credence by the trial court, and the appellate court will not pass upon the credibility of witnesses who have testified in the court below. *Olevas v. Olevas*, 61 Cal. 386; *Hardenburg v. Bacon*, 33 Cal. 356.

When one is surprised by the evidence of the adverse party, he must apply to the trial court for time to get evidence to meet it. *Ferrer v. Home Mutual Ins. Co.*, 47 Cal. 416; *Doyle v. Hurlid*, 38 Cal. 456; *Schellhous v. Ball*, 29 Cal. 608; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910.

SLOAN, J.—On the fifteenth day of August, 1893, the Hartford Banking Company, a corporation duly organized under the laws of the territory of Arizona, and doing a banking business in the city of Phoenix, executed and delivered to J. E. Walker a deed of assignment of all the property belonging to the bank,—real, personal, and mixed,—in trust for the benefit of the creditors of the company. The books of the bank at the time of the assignment showed that appellee, C. H. Gray, was indebted to the bank for overdrafts in the sum of \$4,803.89. On the thirteenth day of June, 1895,

said assignee brought suit to recover from said Gray the amount of said indebtedness as shown by the books of the bank. The answer of Gray to the complaint in this action contained a general denial, and by way of special defense set up that between the thirtieth day of May, 1895, and the first day of June, 1897, the defendant, for the use and benefit of the plaintiff's assignor, the Hartford Banking Company, advanced and paid over to the Bank of British Columbia the sum of \$8,528, in which said sum said banking company was indebted to the Bank of British Columbia; that neither the plaintiff nor said Hartford Banking Company had repaid said sum to the defendant, or any part thereof. By way of further answer and counterclaim, the answer alleged that at various times between the first day of January, 1889, and the first day of July, 1893, said defendant deposited with the said Hartford Banking Company large sums of money, aggregating the sum of thirteen thousand dollars, for the use of defendant (to be drawn out and used by him); that on the — day of January, 1893, said defendant demanded of said banking company said sum of thirteen thousand dollars; and that the said bank had failed and refused to pay the same, or any part thereof,—and prayed that the said Hartford Banking Company be made a party to the action, and that defendant recover judgment for said sum of thirteen thousand dollars, with interest; and that the plaintiff be ordered to pay the same out of any funds he might have belonging to said banking company; and for costs. No answer was filed by the plaintiff in this action to the defendant's counterclaim.

The record discloses that at the time of the institution of the above action there was pending in the district court of Maricopa County an action brought by said C. H. Gray and Mary A. Gray, his wife, against the said Hartford Banking Company and said J. E. Walker, assignee of said company. The object of this suit was to obtain an injunction against Walker, as assignee, restraining him from proceeding with the sale of certain premises owned by plaintiffs under a judgment obtained by the Bank of British Columbia against said plaintiffs for the sum of \$10,057.82, including interest and costs, and the foreclosure of certain mortgage liens against said premises, which said judgment had been assigned to said Walker, as the assignee of said Hartford Banking

Company. As a ground for said relief, plaintiffs in this suit set up that the said judgment represented an indebtedness which had been evidenced by two promissory notes of five thousand dollars each, each secured by a mortgage on premises belonging to said C. H. and Mary A. Gray, and that these notes and mortgages were given to said Hartford Banking Company without any consideration whatever, and were accommodation paper merely. The complaint in injunction further alleged that said Gray had paid the Bank of British Columbia on said notes and mortgages the sum of \$8,520, for which judgment was asked against said Walker, as assignee, for said amount, together with the costs.

When these two cases were called for trial, they were, by the consent of parties, tried together; the testimony in the injunction case being first taken, and by stipulation, so far as applicable, was considered as offered in the case of Walker, as assignee, against C. H. Gray. In the injunction suit the court found that the plaintiffs had failed to establish any equitable ground for enjoining the enforcement of the judgment obtained by the Bank of British Columbia, and assigned to Walker as assignee, upon which judgment there was an unpaid balance of \$5,154.51, and dismissed the action.

In the suit of Walker, assignee, against C. H. Gray, the findings of fact made by the court were as follows: "First. That on the 15th day of August, 1893, the Hartford Banking Company executed and delivered to the plaintiff a deed of assignment, in trust and for the benefit of all its creditors, of all the property belonging to said banking corporation, and that plaintiff is the duly qualified and acting trustee of said corporation. Second. That in divers sums and at divers times between the 1st day of January, 1889, and the 1st day of July, 1893, the said defendant, C. H. Gray, deposited with the Hartford Banking Company, to be placed to the credit of said defendant, and to be drawn out on checks of said defendant when he should so elect, the total sum of \$51,851.36, and with said sum so deposited by defendant with the said Hartford Banking Company, was included the sum of \$31,500 so deposited by the defendant with the Hartford Banking Company on the 12th day of November, 1890, and of which said sum \$22,000 only was placed to the credit of said defendant by the said Hartford Banking Company, and

the remainder thereof, to wit, the sum of \$9,500, was by the cashier of the said Hartford Banking Company wrongfully, and without the knowledge or consent of said defendant, C. H. Gray, placed to the credit of E. H. Hiller, trustee; that the said sum of \$51,851.36 deposited by the defendant, C. H. Gray, with the Hartford Banking Company, also included the sum of \$1,000 so deposited by the said defendant on November 12, 1890, to be drawn out by the said defendant on the performance of certain conditions by the said defendant, and that thereafter the said conditions were duly performed by the said defendant, and the bank has undoubtedly received authority to pay said \$1,000, but that said assignee placed it to the credit of said defendant in the books of the said bank; and that the defendant never drew out the same, and is now entitled to the same against the plaintiff herein. Third. That between the 1st day of January, 1889, and the 1st day of July, 1893, said defendant drew out of said bank the sum of \$46,155.76, which said amount includes the sum of \$4,803.89 mentioned in the complaint of plaintiff herein, and for which suit was brought by the plaintiff. Fourth. That on the 15th day of August, 1893, the date upon which said Hartford Banking Company made said assignment, it was indebted to said defendant upon said deposits in the sum of \$5,696.11, no part of which has been paid to the said defendant." Under these findings, the court gave judgment for the defendant, Gray, in the sum found due him,—to wit, \$5,696.11,—less the amount due from said C. H. and Mary A. Gray to Walker, as the assignee of the Hartford Banking Company, under the judgment of foreclosure rendered in the suit of the Bank of British Columbia against C. H. Gray and Mary A. Gray,—to wit, the sum of \$5,154.51. This left a balance of \$541.60, which sum, together with the costs, Walker, as assignee, was ordered and adjudged to pay to said C. H. Gray out of any funds in his hands as such assignee, or that might thereafter come into his hands, belonging to the Hartford Banking Company, at the same ratio as other debts of said company.

The appellant, Walker, filed his motion for a new trial, in which he set up that at the trial of the action he was taken by surprise, in that, from the answer and counterclaim filed, he was led to expect that Gray's defense would be limited to

proof that the sum of \$8,528, alleged to have been paid the Bank of British Columbia, had been paid for the benefit of said Hartford Banking Company under the notes given as accomodation paper, and to proof that between the first day of January, 1889, and the first day of July, 1893, he had deposited with said Hartford Banking Company the sum of thirteen thousand dollars, which had not been drawn by him or paid to him by said bank; that upon the trial Gray was permitted to testify, over objection, that on or about November 12, 1890, a certain check for thirty-one thousand five hundred dollars had been deposited by him in the said bank, which should have been credited to him on the books of the company, but that in fact but twenty-two thousand dollars of this sum was so credited, and that the balance of nine thousand five hundred dollars was placed by one E. H. Hiller, cashier of said bank, to the account of E. H. Hiller, trustee, without authority, and without his knowledge and consent, and that the said sum of nine thousand five hundred dollars was due him from said bank, and for which he should be credited; that there was nothing in the pleadings to indicate that an issue would arise as to the proper disposition of the nine thousand five hundred dollars, and that, had he known or anticipated that such an issue would arise, he would have been prepared to have met the issue with the production of testimony showing that Gray had been credited by the bank in the total amount due him, and that the nine thousand five hundred dollars placed to the credit of E. H. Hiller, trustee, was not the money of said C. H. Gray, but the money of said E. H. Hiller, trustee; that since the trial of the action he has learned by the affidavits of one A. G. Hubbard and said E. H. Hiller that the said nine thousand five hundred dollars was a part of the thirty-one thousand five hundred dollars paid into the bank on a check payable to the order of said E. H. Hiller, twenty-two thousand dollars of which last amount was to be paid to said Gray, and the said nine thousand five hundred dollars was for the purpose of paying certain indebtedness of said Gray, and certain costs incurred in a suit wherein said Gray was a party; that the testimony of said Hubbard and said Hiller could have been obtained by him, had he known or expected, or had reason to know or expect, that said testimony would be material in the trial of

said action. The court overruled the motion for a new trial, from which ruling and from the judgment Walker appeals.

Six assignments of error were made by counsel for appellant in their brief. The first two were based upon the reception of evidence on the part of appellee, Gray, and the rulings of the court thereon,—particularly upon the admission of the testimony of Gray relating to the check for thirty-one thousand five hundred dollars, and the misappropriation by the cashier of the bank of nine thousand five hundred dollars, part of the proceeds of the check. It is contended that neither the answer nor the counterclaim filed in this action supports this evidence. This testimony was put in in the injunction case, in which the transactions between Gray and the bank were fully gone into. When the testimony was introduced, the objection was made by counsel for appellant that it was “immaterial, irrelevant, and incompetent.” The question that no issue was made by the pleadings which rendered the testimony of Gray as to the misappropriation of the nine thousand five hundred dollars admissible was not raised. Again, as we have seen, at the close of the testimony put in in the injunction case, counsel for appellant stipulated in open court that said testimony, in so far as applicable, should be considered by the court, and taken as the proof in this case. The record does not show that the court, in ruling upon the objections made to the introduction of evidence in the injunction case, did so with reference to the state of the pleadings in this case. Appellant, therefore, in order to save an exception to the admission of testimony given in the former case relating to the subject-matter of this action on the ground of insufficient allegations in appellee’s answer and cross-complaint, should have, as a part of his stipulation, raised the point, and not waited until after the court’s decision. Had the cross-complaint been so radically defective as not to support a judgment thereon, no objection or exception thereto was necessary in order to save the point. An inspection, however, of the counterclaim, will show that it is sufficient in this respect, no matter how great the variance between the allegations of such counterclaim and the proof may have been, as it clearly stated a cause of action. We hold, therefore, that appellant waived his objection by his stipulation and failure to raise the point at any time during the trial.

The third and fourth assignments of error are based upon the insufficiency of the evidence to support the judgment. It is contended in support of these assignments that appellant was concluded from claiming that the bank misappropriated the sum of nine thousand five hundred dollars out of the proceeds of the check for thirty-one thousand five hundred dollars deposited by him with the Hartford Banking Company, and that he therefore should be credited with that amount, because subsequently he gave to the bank two notes, for five thousand dollars each, secured by mortgage on his homestead and other real estate, as found by the court in the judgment rendered in the injunction case. In support of this contention, counsel for appellant cite a large number of authorities. None of these, however, go to the extent of holding that the giving of a note is conclusive evidence of a settlement of all accounts between the parties, and that the amount expressed in the note represented the exact indebtedness of the maker to the payee, as a result of such settlement. The farthest extent to which these cases go is that the giving of a note where there are mutual accounts between the maker and payee is *prima facie* evidence of a settlement of the accounts, and that the amount expressed in such note actually represents a balance due from the maker to the payee. Such a note is not held, in other words, to be conclusive evidence that the maker was actually indebted to the payee in the amount mentioned therein, as a result of a complete and full settlement of mutual accounts, but only to raise a presumption of this fact, which may be overturned by competent evidence.

The fifth and sixth assignments of error have reference to the action of the court in overruling appellant's motion for a new trial upon the ground of surprise and newly-discovered evidence. Appellant contends that the trial court erred in not granting him a new trial for the reason that he was taken by surprise by the testimony of Gray relative to the misappropriation by the cashier, Hiller, of the nine thousand five hundred dollars, because there was nothing in the answer or counterclaim of appellee, Gray, to indicate that any such defense would be made, and for the reason that the affidavits of A. G. Hubbard, of the firm of Hubbard & Bowers, who drew the check for thirty-one thousand five hundred dollars,

and the affidavit of the cashier, E. H. Hiller, made part of the motion, contradicted the testimony of Gray, and showed that the latter had been credited with the full amount of the proceeds of said check for thirty-one thousand five hundred dollars which was due him, and that there was no misappropriation of the remainder, as was claimed by him, and for the further reason that if appellant had had reason to expect or had had knowledge that such a defense would be made, he would have had the testimony of said Bowers [Hubbard] and of said Hiller on the trial of the cause. Surprise which is the result of no lack of diligence, and which operated to the prejudice of the party surprised, upon the trial, and prevented his obtaining evidence material and competent, is a good ground for the granting of a new trial. The party affected, however, must first have exhausted all his other remedies, before he is entitled to a new trial. He will not be permitted to take his chances of obtaining a verdict or decision, and to then for the first time avail himself of the point on motion for a new trial. As we have seen, the testimony of Gray was put in in the injunction case. The records show that this cause was begun on the twenty-eighth day of May, 1898, and concluded on the ninth day of June, 1898. Gray was the first witness called in the action. The record fails to disclose that appellant made any application to the court for a continuance in the injunction case in order that he might meet the testimony of appellee which he claims occasioned his surprise; nor does it show that at the conclusion of the injunction case he made an application for a postponement of the hearing of this case in order that he might procure the testimony of Hubbard and Hiller; nor did he call the court's attention to the fact that the testimony of Gray made it necessary that he should procure the testimony of other witnesses than those then in attendance on the court. The appellant had abundant opportunity to apply to the court for a continuance of this cause upon the ground of surprise, and during the trial of the injunction suit had abundant time within which to consider and determine whether the testimony of Hiller or other witnesses would have been needed to meet the testimony of Gray in this suit. His silence upon the point of surprise during the trial of the injunction case, and his willingness to enter upon the hearing of this cause under stipulation that the proof in

the injunction case should be the proof in this case, indicated that he was content to submit the question as to the misappropriation by the bank of the nine thousand five hundred dollars as claimed by Gray, on his part, upon the evidence of the books of the company, and upon the other evidence in the cause. And, having lost, he should not thereafter be heard to complain because of insufficient preparation to meet the issues as raised by appellee. For that reason, we do not think the trial court erred in overruling appellant's motion for a new trial. The judgment of the court below is affirmed.

Doan, J., and Davis, J., concur.

[Civil No. 671. Filed June 2, 1899.]

[57 Pac. 611.]

**JAMES H. McCLINTOCK et al., Defendants and Appellants, v. J. H. BOLTON, Defendant and Appellee.
J. C. GOODWIN, Intervener.**

1. **APPEAL AND ERROR—RECORD—ASSIGNMENTS OF ERROR—MATTERS WITHOUT THE RECORD—AFFIDAVITS.**—This court may not regard assignments of error which are based upon no matter of record in a cause, but which are supported wholly by the affidavit of counsel for appellant.
2. **SAME—JURISDICTION OF TRIAL COURT—CANNOT BE QUESTIONED ON APPEAL WHERE THERE IS A GENERAL APPEARANCE BELOW.**—Appellant cannot on appeal question the jurisdiction of the lower court where the record shows a general appearance below.
3. **PLEADING—ANSWER—CROSS-COMPLAINT—NATURE OF TO BE DETERMINED BY DEFENSE.**—The character of a pleading, and whether it be an answer or a cross-complaint, must be determined from the nature of the defense as made, no matter what the pleader may choose to term it.
4. **SAME—SAME—TENDER—DEFENSE—NEEDS NO REPLICATION.**—Tender, like a plea of payment, is but a defense, and, when set up in an answer, needs no replication, under our system of pleading.
5. **SAME—SAME—FORECLOSURE—INVALIDITY OF INDEBTEDNESS—REQUIRES NO ANSWER.**—A plea to a suit to foreclose a mortgage, denominated a cross-complaint, setting up that the note and mort-

gage sued upon did not represent a valid indebtedness, is in effect a denial that the mortgages were valid and subsisting liens against the premises, matter which the court was required to find before any valid judgment of foreclosure could be made, and is not in the nature of a cross-complaint, and requires no answer.

6. INTEREST—NOTE—ATTORNEY'S FEES—BEAR INTEREST AT LEGAL RATE.

—It is error to render judgment upon a note bearing interest and providing an attorney fee in event of suit, for the amount of the note and attorney fee with interest upon the whole at the rate mentioned in the note. The attorney fee should bear interest at the legal rate.

7. SAME—JUDGMENT—ACTION ON—CONFORMITY TO FORMER JUDGMENT—

INTEREST—LEGAL RATE.—A judgment in an action upon a judgment should correspond therewith as to the interest upon the principal sum, but the interest upon the interest accrued under the former judgment should be computed at the legal rate.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Modified.

A. J. Daggs, for Appellants.

It is the order of the court transferring the case to another district for trial that transfers the jurisdiction, and when the court having the power to make it does make it, it vests the jurisdiction *ipso facto* in the court to which it is sent, and nothing but an order from the court to which it is sent remanding this case back can ever again reinvest the original court with jurisdiction. *Hatch v. Galvin*, 50 Cal. 441; *Ryburn v. Pryor*, 10 Ark. 417; *Goodhue v. People*, 94 Ill. 37; *Fan v. Fuller*, 12 Iowa, 83; *Wormley v. Canal Dist.*, 45 Iowa, 666; *Smith v. Commonwealth*, 95 Ky. 322, 25 S. W. 106; *Dimmit v. Robbins*, 74 Tex. 441, 12 S. W. 94; *State v. Compton*, 77 Wis. 460, 46 N. W. 535; *Fatt v. Fatt*, 78 Wis. 633, 48 N. W. 52; *Ammons v. State*, 9 Fla. 530; *Walcott v. Walcott*, 32 Wis. 63; *Franco-Texan Land Co. v. Howe*, 3 Tex. Civ. App. 315, 22 S. W. 766.

W. J. Kingsbury, and Kibbey & Edwards, for Appellee.

"If a court has once jurisdiction, and shall so have exercised it as to have lost jurisdiction it may be restored by the consent of the parties." *Taylor v. Atlantic and Pacific R. R. Co.*, 68 Mo. 397; *Gager v. Doe*, 29 Ala. 341.

SLOAN, J.—On the twenty-first day of July, 1894, John H. Bolton brought suit in the district court of Maricopa County against James H. McClintock, A. J. Daggs, and P. J. Cole to foreclose a mortgage on the southeast quarter of section twenty-two, township 1 south, range 4 east, of the Gila and Salt River base and meridian, executed by defendant James H. McClintock to secure his promissory note in the sum of five hundred and fifty dollars, dated December 30, 1890, and made payable to said John H. Bolton. The complaint alleged that the defendants A. J. Daggs and P. J. Cole had, or claimed to have, some interest in or lien on said mortgaged premises which had accrued since the execution of the mortgage. Personal service was had upon the defendants McClintock and Cole, and service by publication was had on defendant A. J. Daggs. Default was taken against all of the defendants, and at the November, 1894, term of said court, judgment by default was duly entered against McClintock in the sum of five hundred and fifty dollars, with interest on the same at the rate of one and one half per cent per month, compounded quarterly from the seventh day of July, 1893, until paid, and for the sum of fifty-five dollars attorney's fees and for all costs of suit, and a decree entered foreclosing the mortgage lien on said premises, and directing the sale of the same to satisfy said judgment. On the nineteenth day of March, 1895, and during the term at which said judgment was entered, one J. C. Goodwin applied to the courts for an order setting aside said judgment, and permitting him to intervene in the said action. The order was consented to by Bolton, the plaintiff in the case, and J. C. Goodwin was permitted to intervene and file an answer to the cause of action set up by the plaintiff. In this answer Goodwin set forth that on October 16, 1893, said James H. McClintock and Sara A. McClintock gave their promissory note to the Phoenix National Bank, of Phoenix, Arizona, in the sum of three hundred dollars, payable on the sixteenth day of April, 1894, and drawing interest at the rate of one and one half per cent per month from date until paid, and providing for an attorney's fee of ten per cent upon the amount due in case of suit; that said note was secured by mortgage on the said southeast quarter of section twenty-two, township 1 south, range 4 east, etc.; that thereafter the said Phoe-

nix National Bank instituted suit against the said James H. McClintock and Sara A. McClintock in the said district court, and on the twenty-third day of November, 1894, obtained judgment in its favor for the sum of \$389.50, and for the foreclosure of said mortgage; that said judgment, on the 16th of March, 1895, had been duly assigned and transferred to the intervener, who then became the legal owner and holder thereof. Intervener prayed that the sum due on said judgment be declared a lien on the said real estate second to the lien of the plaintiff Bolton, and that the said real estate be decreed and directed to be sold, and from the proceeds thereof there be first paid the claim of the plaintiff, and, second, intervener's claim. The order setting aside the judgment was made by the Honorable John J. Hawkins, district judge. Subsequently, and during the same term, the defendant A. J. Daggs appeared before said court by counsel, and applied for an order suspending all further proceedings in the cause until the further order of the court, which was accordingly entered. Subsequently, and during the same term, the following order was entered by the Honorable A. C. Baker, presiding judge of said district court: "The court, on its own motion, orders that this case be, and the same is hereby, transferred to the fourth judicial district in and for the county of Yavapai for trial, for the reason that the judge of this court is disqualified to try the same." The record does not disclose any other proceedings in the cause until April 3, 1897, which was a regular judicial day of the November, 1896, term of said court. The minutes of the court for this day show that, on motion of the attorney for the defendants, it was ordered that the order theretofore entered, transferring the cause to Yavapai County for trial before the Honorable John J. Hawkins, be vacated and set aside, and the papers in the cause returned to the clerk of the said district court in and for Maricopa County, and the cause be placed upon the docket for trial. On December 11, 1897, and at the November, 1897, term of said court, the defendant A. J. Daggs appeared, and moved the court to strike the cause from the docket for want of jurisdiction. This motion was denied. During the May term, 1898, of said court, the London Company, by A. J. Daggs, its attorney, moved the court for leave to file an application to intervene in the cause, which

motion was granted. The record does not show whether the application was thereafter actually made, or whether, when made, the London Company was permitted to intervene in the action. On October 8, 1898, the cause was set down for trial for the eighteenth day of October, 1898. On October 15, 1898, defendant A. J. Daggs applied to the court for an order setting aside the default theretofore,—to wit, on the 13th of November, 1894,—entered against him in the cause, and that he be allowed to file his answer therein. Thereupon the court ordered the default set aside, and granted said defendant leave to file his answer, and the answer was thereupon filed by said defendant. Upon the trial of the action, testimony was introduced upon behalf of the plaintiff, as well as upon behalf of the intervener, J. C. Goodwin. No testimony was introduced by or on behalf of defendant Daggs. The latter contented himself with objecting to the introduction of testimony on the part of plaintiff and intervener, upon the ground that no answer had been filed by them to what he termed his verified cross-bill. The court found that the interest of plaintiff John H. Bolton in and to the note and mortgage sued upon by him had been, since the commencement of the suit, assigned and transferred to Mary Goodwin, and ordered that said Mary Goodwin be substituted as the party plaintiff in the suit, and that the proceedings thereafter should be prosecuted in her name, as plaintiff, as the legal successor in interest of said John H. Bolton. The court further found from the proof that there was due to the said Mary Goodwin upon the note of the defendant James H. McClintock, given to the said John H. Bolton and assigned to said Mary Goodwin, the sum of \$1,405.40 principal and interest, and the further sum of \$140.54 attorney's fees. The court further found that there was due and unpaid upon the judgment theretofore obtained by the Phoenix National Bank against James H. McClintock and Sara A. McClintock, and which had theretofore been assigned to intervener James C. Goodwin, the sum of \$648.67, being the amount of principal, interest, and costs due. The court further found that the amount due plaintiff was secured by mortgage on the lands described in the complaint, and that the said mortgage constituted the first lien upon the same, and further found that the amount due intervener J. C. Goodwin constituted a second lien upon said premises. The

court ordered, adjudged, and decreed that the said premises be sold according to law, and that out of the proceeds of said sale there should be paid—First, the costs of said sale; second, the amount due Mary Goodwin found as aforesaid; third, the amount found to be due intervener James C. Goodwin; and, fourth, that the surplus, if any, should be paid to whomsoever may be entitled to the same, and that all the right, title, and equity of all the parties to the suit in and to said premises, and every part thereof, be forfeited, barred, and foreclosed. From this judgment, and from the order overruling defendant A. J. Daggs's motion for a new trial, he brings this appeal. The London Company also joins in the appeal; but, as the record nowhere discloses that the latter had any standing as intervener, or ever became a party to the cause, we will consider the appeal as though taken by defendant A. J. Daggs, and by him only. Appellant has filed a voluminous brief, in which are a large number of assignments of error. Grouping these assignments, and disregarding those which are based upon no matter of record in the cause, but which are supported wholly by the affidavit of counsel for the appellant made in the assignments, and which therefore we may not regard, three questions are presented: 1. That the court had lost jurisdiction of the case by reason of the order made by the presiding judge transferring the cause for trial to the fourth judicial district; 2. That no answer was made to what appellant terms in the assignment his verified cross-answer filed by him, and he was therefore entitled to judgment according to the prayer of said answer; and 3. That the judgment is excessive.

1. The question whether the district court of Maricopa County had lost jurisdiction of this cause by reason of the order made by the presiding judge at the November, 1894, term of said court, is not one which appellant can, under the record, now raise. It is true the record discloses that a motion was made by appellant in the court below to have the cause stricken from the files, for the reason, as assigned, that the court had no jurisdiction of the action. At the time the motion was presented, appellant was in default, and had no right, therefore, to appear; but, however this may be, his appearance, if such it was, was not special, but a general one. Again, at a subsequent term at which this motion was made,

appellant appeared and formally applied to have the default taken against him set aside, and for leave to file an answer in the suit. The court permitted the default to be vacated, and gave appellant leave to answer, whereupon appellant appeared and answered without raising the question of jurisdiction. It matters not, therefore, whether the order transferring the cause to the Yavapai County court was valid, or whether, as subsequently regarded by the trial court, it was nugatory and void. The appellant voluntarily appeared in the action, and by his consent conferred jurisdiction upon the trial court. The court had jurisdiction of the subject-matter, and, by consent of parties and the voluntary appearance of appellant, had jurisdiction of the persons. *Center Township v. Marion County Comrs.*, 110 Ind. 579, 10 N. E. 291; *Gager v. Doe*, 29 Ala. 341.

2. The answer made by A. J. Daggs, and which he terms a verified cross-answer or complaint, is too lengthy to be given in full. It is discursive, argumentative, and in many particulars inconsequential. There may be gathered from it, however, two defenses which the pleader had in mind, and which he has attempted, however badly, to set up. The first is a tender of the amount due upon the note and mortgage set forth in the complaint, and, second, that said note and mortgage had been fraudulently assigned to Mary Goodwin, and the judgment obtained by the Phoenix National Bank had been fraudulently assigned to intervener J. C. Goodwin in the interest of, and for the benefit of, James H. McClintock and Sara A. McClintock, and that, at the time of said intervention by said J. C. Goodwin, the indebtedness represented by the note and mortgage set forth in the complaint, as well as the indebtedness represented by the judgment obtained by the Phoenix National Bank, had been paid by the said McClintocks, and that said assignments were made, and that said suit was being prosecuted, for the purpose and intent that the premises sought to be foreclosed should be sold to satisfy the said indebtedness, to the injury of the defendant as the owner of said premises.

It is contended by appellant that the answer so made by him was one which required a replication by the plaintiff and by the intervener, and that in default thereof he should have been given a judgment according to the prayer with which

said answer was concluded, which was, in effect, that the mortgages given to secure the indebtedness represented by the note given to plaintiff, and by the judgment obtained by the Phoenix National Bank, should be decreed to be a cloud upon the defendants' title, and that said premises be freed from the lien of said mortgages. No matter what appellant may choose to term this pleading on his part, nor what affirmative relief he may have asked therein, the character of the pleading, and whether it be an answer or a cross-complaint, must be determined from the nature of the defense as made. Tender, like a plea of payment, is but a defense, and when set up in an answer needs no replication under our system of pleading.

The second defense made by appellant was likewise not one that required a replication, inasmuch as it merely raised the question of the right of the plaintiff and intervener to maintain the action, for the reason, as alleged, that the note and mortgage, as well as the judgment, did not represent a valid indebtedness against the McClintocks. It must be remembered that A. J. Daggs was made a defendant because he held the legal title to the premises sought to be foreclosed, and that his sole interest lay in defeating a foreclosure of the mortgages and a sale of the premises to satisfy the same. The effect of his answer and both defenses is a denial that the mortgages were valid and existing liens against the premises, matters which the court was required to find before any valid decree or judgment foreclosing said mortgages and ordering said sale could be made. The answer, therefore, of appellant was not in the nature of a cross-complaint, and needed no answer thereto.

3. We find the judgment to be erroneous in two particulars: First. The court found that there was due Mary Goodwin, the successor in interest of John H. Bolton, the sum of \$1,405.40, and allowed an attorney's fee of ten per cent upon this amount, and gave judgment for the amount found due, together with said attorney's fee, and allowed interest on the total amount of the judgment at the rate of one and one half per cent per month. Under the terms of the note, the judgment should have been for \$1,405.40, with interest thereon at one and one half per cent per month, and for the further sum of \$140.54 attorney's fee, with interest thereon at seven per

cent per annum, together with the costs, which were taxed at \$39.65. Second. The court found that there was due James C. Goodwin upon the judgment assigned to him by the Phoenix National Bank the sum of \$648.67, and allowed interest on \$513.30 of this amount at the rate of one and one half per cent per month, and interest upon \$135.37 thereof at the rate of seven per cent per annum. The judgment sued upon was for the amount of \$406.05, including costs. Of this amount, the judgment provided that three hundred dollars should bear interest from the date of the judgment,—to wit, the twenty-third day of November, 1894,—until paid, at the rate of one and one half per cent per month. The judgment, therefore, in this case should have corresponded with the judgment sued upon; that is to say, the judgment should have been that said James C. Goodwin have and recover the sum of three hundred dollars, with interest thereon from the twenty-third day of November, 1894, until paid, at the rate of one and one half per cent per month, and the further sum of \$206.05, with interest thereon from said twenty-third day of November, 1894, at the rate of seven per cent per annum until paid. We find no reversible error in the record which requires the granting of a new trial, but the court below is directed to modify its judgment in the particulars in which we have hereinbefore found it to be erroneous.

Doan, J., and Davis, J., concur.

[Civil No. 659. Filed June 2, 1899.]

[57 Pac. 617.]

CHARLES L. HALL, Plaintiff and Appellant, v. SOUTHERN PACIFIC COMPANY, Defendant and Appellee.

1. CLAIM AND DELIVERY—PLEADING—ANSWER DEFECTIVE—FAILURE TO TENDER ISSUE—POSSESSION—WAIVER—CURED BY JUDGMENT.—Where the answer in an action of claim and delivery denied the allegation of plaintiff's ownership, but did not deny the allegation that he was entitled to the immediate possession of the property, and plaintiff made no attempt before or at the trial to take ad-

vantage of the defect, but, on the contrary, tried the case as though his right of possession was in issue, the defect in the answer, under these circumstances, was cured by the judgment.

2. **SAME—JUDGMENT—RIGHT TO RETAIN PROCEEDS PENDING REFUND OF CHARGES—EVIDENCE.**—Plaintiff replevied property from a railroad company, paying the freight charges. At the trial, it was admitted that the property had been sold, and that its value was four hundred and sixty dollars plus the freight charges. The judgment, in the alternative for the return of the property or for the payment of four hundred and sixty dollars, was not error, nor was plaintiff entitled to retain the proceeds until the freight charges were refunded, as the property could not be returned, and the money judgment took into consideration the freight charges.
3. **SAME—FINDINGS—SUFFICIENCY—TITLE IN THIRD PARTIES—IMMATERIAL.**—Findings in an action of claim and delivery that plaintiff was not the owner nor entitled to the possession of the property are sufficient to support a judgment for defendant, and further findings, not warranted by the pleadings, that the title was in third parties are immaterial.
4. **SAME—EVIDENCE—MUST RECOVER ON STRENGTH OF HIS OWN TITLE.**—A plaintiff in replevin must recover upon the strength of his own title or right of possession, and, in case he fails to establish his title or right of possession, the defendant is entitled to be restored to his possession.
5. **SAME—SAME—ESTOPPEL.**—Plaintiff in replevin, to prove his title and right of possession, gave evidence of a sale of the property to him under execution against J. C. Goodwin. Defendant sought to prove title in the brothers of Goodwin. Plaintiff, to establish an estoppel against the brothers claiming title, testified that in another suit, wherein the brothers were plaintiffs and himself defendant, plaintiffs gave a cost-bond, with J. C. Goodwin as surety, and that J. C. Goodwin, in justifying, testified that he was the owner of this property. One of the brothers denied that either of them was present, and testified that the property belonged to them continuously since prior to the time of the latter suit. The record failed to show that the cost-bond was approved, or what relation the suit in which execution was issued against Goodwin bore to the suit in which the cost-bond was filed, or that the brothers had any knowledge of the representations, or that an advantage to the brothers or a prejudice to the plaintiff resulted therefrom. Upon the record there was no error in the court refusing to find an estoppel.
6. **SAME—BAILEE—RIGHT OF POSSESSION—LIMIT OF RECOVERY—LEVY v. LEATHERWOOD, 5 ARIZ. 244, DISTINGUISHED.**—As against one who neither had title nor the right to the possession, a bailee may maintain replevin for the possession of the property which is the subject of the bailment, and may recover its full value from such

stranger who may have unlawfully converted it, holding the amount so recovered in excess of his own interest in trust for his bailor. *Levy v. Leatherwood*, *supra*, distinguished.

7. **SAME—DAMAGES—JUDGMENT FOR VALUE NOT WITHIN THE MEANING OF DAMAGES AS USED IN REV. STATS. ARIZ. 1887, PAR. 202.**—A judgment in claim and delivery for the value of the property taken is not a judgment for damages, as that term is used in paragraph 202, *supra*, which provides that "the court or jury must assess the value of the property taken, and the damages for taking and detaining the same."

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

C. W. Wright, for Appellant.

Hereford & Hazzard, for Appellee.

SLOAN, J.—In the court below, Charles L. Hall brought suit in claim and delivery against the Southern Pacific Company to recover the possession of thirty-one and one half tons of street-railway iron. The complaint alleged that Hall was the owner and entitled to the immediate possession of the railway iron, and that the same was wrongfully detained by the Southern Pacific Company from the plaintiff, Hall; that the actual value of the same was four hundred and fifty-five dollars; and that the said property had not been seized under any process, execution, or judgment against the property of Hall. The complaint further alleged that the railroad company claimed a lien on the property for freight, amounting to \$285.52, and that the said freight charges had accrued without the knowledge or consent of the plaintiff; that, notwithstanding he was in no way responsible for said freight charges, and although the same were not a lien on the property, plaintiff, before the commencement of the suit, tendered said sum to said company in payment of said charges, and demanded possession of the rails; that the company refused to receive said money or deliver possession of said property. The defendant company answered the complaint, denying plaintiff's ownership of the property described in the complaint, and

that it wrongfully detained the same, and that the same was of any greater value than four hundred and fifty dollars. By way of further answer the defendant company set up that the rails were, on the fifteenth day of February, 1898, in the possession of and claimed by T. J. Goodwin and R. G. Goodwin, of the town of Tempe, Maricopa County, Arizona, and that on said date said Goodwins offered the said railroad iron for shipment over the Maricopa, Phoenix and Salt River Valley Railroad and the railroad of the defendant company from Tempe to the city of Tucson, in Pima County, Arizona, and on said date the said iron was so shipped by the said Goodwins over the said railroads and consigned to one C. F. Hoff, agent of the Tucson Street-Railway Company, at said town of Tucson; that for a long time prior to the date of the shipment above mentioned said Goodwins had been the owners and reputed owners of the said iron; that the defendant company had no knowledge prior to said shipment that plaintiff had any claim of ownership to the said railroad iron; that the first notice of such claim which the defendant company had was after the said shipment of said iron from Tempe to Tucson, and after freight charges to the amount of \$285.52 had accrued against the same, and for which the defendant claimed a lien on the same. The defendant company prayed judgment against the plaintiff for the return of the railroad iron, or, in case a return thereof could not be had, then for the sum of four hundred and sixty dollars, the value thereof; and also prayed that, in the event the court should adjudge the railroad iron to be the property of the plaintiff, then that it have judgment against the plaintiff for the sum of \$285.52, the freight charges on the same, together with its costs. The cause was tried by the court without a jury, and judgment rendered for the defendant company. The findings of fact made by the court were as follows. "1. That the defendant, the Southern Pacific Company, was entitled to the possession of the thirty-one and one half tons of street-railway iron described in the complaint herein, as bailee for T. J. Goodwin and R. G. Goodwin; 2. That the said thirty-one and one half tons of street-railway iron was, on the twenty-fourth day of February, 1898, wrongfully taken from the possession of the defendant and delivered by the sheriff of the county of Pima, Arizona Territory, to the plaintiff herein;

3. That before the delivery of the said street-railway iron to the plaintiff, the plaintiff had filed an affidavit in claim and delivery, and the plaintiff, as principal, and W. H. Barnes and George Pusch, as sureties, had made, executed, and delivered to the sheriff a replevy bond, conditioned as required by law; 4. That the plaintiff failed to show a right to the possession of the said property, and has not returned the possession thereof to the defendant; 5. That the value of the said property is \$460 and the freight paid by the plaintiff therein." The court further found as conclusions of law from the foregoing facts that the plaintiff had no right to the possession of the property sued for, and had wrongfully taken possession of the same from the defendant company, and that the title to the said property was in the said Goodwins, and the right of possession in the defendant company as a bailee of the aforesaid Goodwins. The court gave judgment against the plaintiff and against his said sureties on his replevy bond for the return of said property to the defendant company, if return could be had, and, if not, then that it recover of plaintiff and his said sureties the sum of four hundred and sixty dollars, the value of the iron as found, and for costs of suit. From this judgment and the order overruling plaintiff's motion for a new trial, Hall brings this appeal.

The appellant makes the following assignments of error: "First. The court erred in deciding that Hall was not entitled to the possession of the property, the pleadings admitting that he was. Second. The court erred in deciding that Hall was not entitled to the possession of the property, he having an existing lien thereon for the transportation charges he had advanced. Third. The court erred in adjudging that the title in and to said property was in the two Goodwins, title in them not having been plead. Fourth. The court erred in deciding that the title to the property was in the two Goodwins, they being, by the facts shown in the case, estopped from denying that the title to the property was in their brother James. Fifth. The court erred in giving judgment against Hall and his sureties and in favor of the company for the value of said property, the company not being its owner, and having no interest in it. Sixth. The court erred in adjudging that the ownership of the property is in the two Goodwins, their interest therein, whatever it was, having

been transferred to the Tucson Street Railway before this suit was instituted. Seventh. The court erred in giving judgment against Hall and in favor of the company for the value of the property, no damages having been pleaded and none claimed by it. Eighth. The court erred in giving judgment against Hall and in favor of the company for the 'restoration' of the property, without adjudging that, on such 'restoration' being made, the company should return to Hall the amount he had paid it as its transportation charges." We will consider these in their order.

1. The answer denied the allegation in the complaint that Hall was the owner, but did not deny the allegation that he was entitled to the immediate possession, of the railroad iron. While the answer was defective in this respect, the appellant, however, made no attempt, before or at the trial, to take advantage of the defect, but, on the contrary, tried the case as though the answer put in issue his right to the possession of the rails. We think, under these circumstances, the defect in the answer was cured by the judgment. Bliss on Code Pleading, sec. 442; *Gale v. Water Co.*, 14 Cal. 26.

2. The record discloses that Hall, at the time of the institution of the suit, gave bond, and replevied the property from the railroad company, and at the time paid the freight charges due the latter. He contends that, as a lien for freight is transferable, his payment of the freight charges to the railroad company gave him a right to retain the property until those charges were refunded to him, and that the judgment is erroneous, because it does not recognize this right. The judgment is in the alternative for the return of the property or the recovery of its value, placed at four hundred and sixty dollars. It was admitted by Hall that he had, before trial, sold the iron. That part of the judgment, therefore, which provided for the return of the property to the company without any provision for the repayment of the freight charges, could not prejudice Hall. Having parted with the property, the money judgment alone was enforceable against him. The latter part of the judgment, providing for the alternative money judgment, fixed the value of the iron at four hundred and sixty dollars. Upon the trial it was stipulated that the actual value of the property was four hundred and sixty dollars, plus \$285.52, the amount of the

freight charges. The payment of the freight by Hall is thus taken into account in the judgment, and appellant is not harmed therein.

3. The court found that Hall was not the owner and was not entitled to the possession of the railroad iron, and found that the appellee was entitled to the possession of the property. These findings were in themselves sufficient to support the judgment. It is of no importance, therefore, so far as appellant is concerned, if the additional finding that the title to the property was in T. J. and R. G. Goodwin be, as claimed by appellant, unwarranted by the pleadings. As both the title and right of possession were found not to be in Hall, his taking and detention of the same from appellee, who was at the time of the taking in the actual possession of the same, became tortious and wrongful. The plaintiff in replevin must recover upon the strength of his own title or right of possession, and, in case he fails to establish his title or right of possession, the defendant is entitled to be restored to his possession. *Stanley v. Neale*, 98 Mass. 343.

4. To maintain his title to the railroad iron, appellant at the trial put in evidence a transcript from the judgment-docket of the district court of Maricopa County which showed that a judgment had been obtained by appellant, Hall, against James C. Goodwin in the sum of \$1,723.94, with interest at eighteen per cent per annum from January 8, 1897, until paid, and \$255.64 attorney's fees and costs. The time of the entry of this record of judgment was January 8, 1897. The transcript showed that on March 22, 1897, there was a balance due on said judgment of \$920.03. Appellant further put in evidence an execution issued out of said court under said judgment against the property of said J. C. Goodwin, and the return of the sheriff, L. H. Orme, showing that he had on the twenty-third day of March, 1897, "levied upon all the right, title, claim, and interest of James C. Goodwin, the defendant herein named, in, of, and to that certain franchise granted by the board of supervisors of Maricopa County, Arizona Territory, on the fifth day of December, 1892, . . . and all of said defendant's right, title, claim, and interest in, of, and to the cars, rails, and railway, and to all things appertaining to, or used on or in connection with, the Tempe Street Railway, as said defendant's right, title, claim, and inter-

est existed on the 8th day of January, 1897, or any interest that he may have since acquired in and to said property." Appellant further put in evidence a deed from the sheriff, L. H. Orme, to the said Charles L. Hall for the property levied upon as aforesaid, dated November 6, 1897; which deed recited that under said levy and execution the property hereinbefore described was sold at public auction in accordance with law on the seventeenth day of April, 1897, for the sum of five hundred dollars to the said Hall; and further recited that six months had expired without any redemption of the said premises having been made. To further maintain his title, Hall testified that on or about the 9th of April, 1894, there was pending in the district court of Pinal County a suit in which one Cosner and T. J. and R. G. Goodwin were plaintiffs, and appellant, Hall, and one Sullivan were defendants; that during the pendency of said suit it became necessary for the plaintiffs to give bond for costs; that said bond was given, said James C. Goodwin and one Caine being the sureties thereon; that said J. C. Goodwin justified before the court upon said bond, and stated in said justification that he was the owner of the Tempe street-railroad plant. The stenographer who took down the testimony of said Goodwin upon said justification gave similar testimony. The representations made by J. C. Goodwin as to his ownership of the Tempe street-railroad plant, thus made, are relied upon by appellant as constituting an estoppel on the part of T. J. and R. G. Goodwin from thereafter claiming title to the same, and appellant claims that the trial court erred in not so finding. On behalf of the appellee, T. J. Goodwin testified that neither he nor R. G. Goodwin were present at the time J. C. Goodwin justified upon the cost bond; and further testified that J. C. Goodwin was never the owner of said street railway, but that the title to the same was, in 1894, and thereafter continued to be, until the time of the trial of this action, in himself and R. G. Goodwin. The record does not disclose whether the cost bond was approved by the Pinal County court, nor does it disclose that the judgment obtained by Hall against James C. Goodwin had any relation with the said cost-bond, or with any matter connected with the suit of Cosner and others against Hall. For aught that appears in the record, the debt which was the basis of Hall's judgment against J. C.

Goodwin may have existed at the time the latter made the representations as to his ownership of the street-railway plant, and may, in fact, have existed long prior thereto. In order to constitute an estoppel, it should have appeared that J. C. Goodwin's representations resulted in T. J. and R. G. Goodwin deriving some advantage therefrom, with a knowledge of the same, or that Hall would be prejudiced thereby, if those representations were permitted to be denied. As we have seen, the record does not show what was done in the matter of the justification as to sureties on the cost-bond, nor does it show that the judgment subsequently obtained by Hall against J. C. Goodwin had any relation to said cost-bond, or with the suit of Cosner and others against Hall and others; nor does it show that T. J. and R. G. Goodwin had any knowledge of said representations, except such as may be imputed to them by reason of the knowledge that their attorneys had who appeared for them upon the justification of said sureties. We cannot find from the record that the trial court erred in refusing to find that T. J. and R. G. Goodwin were estopped by the representations of J. C. Goodwin from asserting title to the property in question.

5. The relation which the Southern Pacific Company bore to T. J. and R. G. Goodwin with regard to the railroad iron was that of a bailee. As against one who neither had the title nor the right to the possession, a bailee may maintain replevin for the possession of the property which is the subject of the bailment, and may recover its full value from such stranger who may have unlawfully converted it, holding the amount so recovered in excess of his own interest in trust for his bailor. Between the general owner of the property and the bailee, or one having a special interest in the property, a recovery by the latter, in case a return of the property cannot be had, must be limited to the value of the special interest possessed by the latter. The case of *Levy v. Leatherwood*, 5 Ariz. 244, 52 Pac. 359, relied upon by appellant in support of his fifth assignment of error, was a case between one who held the legal title to, and who, as against every one except the creditors of his grantor, was a general owner of, the property sought to be replevied, and a sheriff who held the property under writs of attachment, and who therefore had but a special interest in the same, limited to the amount repre-

sented by the attachments. The law of that case has no application to this, for the reason that the court found that Hall was not the owner nor entitled to the possession of the property, and so, as against him, the appellee was entitled to a judgment for the full value of the property, and his right of recovery was not limited to the amount of appellee's lien for freight charges due from its bailors.

6. We find nothing in the record to sustain appellant's sixth assignment of error; on the contrary, the evidence shows that the title to the railroad iron had not been transferred, at the time of the suit, from the Goodwins to the Tucson Street-Railway Company.

7. The appellee, in its answer, claimed a return of the property, and hence, under paragraph 202 of the Revised Statutes, the court properly assessed the value of the property taken, and gave its alternative judgment for the recovery of the same. The court, however, did not, as assumed by appellant in his seventh assignment, award damages against appellant for the taking and detaining of the property. A judgment for the value of the property taken is not a judgment for damages as that term is used in paragraph 202, which provides that "the court or jury must assess the value of the property taken, and the damages for taking and detaining the same," etc.

8. The contention made by appellant in his eighth and last assignment has already been disposed of by us in considering the question raised by appellant's second assignment of error.

We find no reversible error in the record, and the judgment is therefore affirmed.

Street, C. J., and Doan, J., concur.

[Civil No. 653. Filed November 1, 1899.]

[59 Pac. 150.]

P. P. DAGGS, Defendant and Appellant, v. JAMES WILSON, Plaintiff and Appellee.

1. **MORTGAGES—FORECLOSURE—WRIT OF ASSISTANCE—PURCHASER WITHOUT NOTICE—KNOWLEDGE.**—Where the purchaser at a foreclosure sale files an application for a writ of assistance against the lessee of one who had purchased pending the foreclosure proceedings, the lessee's claim that the lessor was a purchaser for value without notice, and that he, the lessee, had no notice of purchaser's claim, is not sustainable, where the lessor had knowledge of the suit prior to his purchase, and the lessee was present when the lessor made a tender for the redemption of the property.
2. **SAME—REDEMPTION—TENDER—VALIDITY OF—TITLE 26, REV. STATS. ARIZ. (SECS. 19-23, ACT NO. 20, LAWS 1889), CONSTRUED.**—Where the statute, *supra*, provides for redemption, only by "payment to the purchaser, or for him to the officer who made the sale," tender of the amount for which the property had been sold, to parties who were not authorized to receive the money or to act for the purchaser, does not constitute a valid and sufficient tender.
3. **APPEAL AND ERROR—RECORD—PRESUMPTION OF REGULARITY AND CORRECTNESS OF PROCEEDINGS OF LOWER COURT.**—It will be presumed where the record on appeal from an order granting a writ of assistance is imperfect in not containing all the evidence that the lower court acted correctly upon the evidence before it.
4. **WRIT OF ASSISTANCE—WHEN PROPER—MORTGAGE—FORECLOSURE.**—The holder of a sheriff's deed for real estate purchased under a decree of foreclosure of a mortgage and a sale of the mortgaged premises has a right to a writ of assistance to procure possession of the premises purchased, as against all persons who were parties to the foreclosure suit, and all who hold under authority given by such parties after the commencement of such suit.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

A. J. Daggs, and J. McAndrew, for Appellant.

In order to obtain a writ of assistance the proof must show that the party in possession is bound by the judgment. No

party can be bound by a judgment in any case to which he was not a party. *Terrill v. Allison*, 88 U. S. 289.

An attorney who has charge of the foreclosure of a mortgage has a right to accept the redemption money, and a tender to him is good. *McLain v. Watkins*, 43 Ill. 24; *Erwin v. Blake*, 9 Pet. 18; *Smith v. Cunningham*, 59 Kan. 552, 53 Pac. 760.

Thomas Armstrong, Jr., for Appellee.

The parties against whom the writ runs are subsequent purchasers from and under the original mortgagor, and, as was said by the California court, "all that is requisite to obtain the writ as against the parties and those holding under them with notice after the commencement of the action, is to furnish the court proper evidence of a presentation of a deed to them and a demand of possession and their refusal to surrender it." *Montgomery v. Byers*, 21 Cal. 103, 107.

"The law is that whoever intermeddles with property in litigation does so at his peril, and is as conclusively bound by the result of the litigation as if he had been made a party from the outset." *Tilton v. Cofield*, 93 U. S. 163.

DOAN, J.—This is an appeal from a decree awarding a writ of assistance to put the purchaser in possession of mortgaged property sold under decree of foreclosure, taken by the lessee of a party who, pending the action for the foreclosure of the mortgage, purchased from one of the defendants therein the mortgaged premises. An appeal was taken to this court from the judgment and decree of foreclosure by the parties defendant. The decision of this court modifying the judgment and decree of the district court in the case of *Johns v. Wilson* will be found, *ante*, p. 125, 53 Pac. 583, where the facts in the case are quite fully set forth. It may be briefly stated here that on April 24, 1893, J. S. Armstrong mortgaged the land in question to James Wilson, the appellee herein, to secure a debt of six thousand four hundred dollars, being part of the purchase price of said land, and afterwards transferred said land, subject to the mortgage, to R. E. Daggs, who assumed the mortgage debt, and placed in possession one W. A. Daggs, as his tenant. On April 26, 1894, the appellee, Wilson, brought an action against the mortgagor, Armstrong, and

his grantee, Daggs, to foreclose the said mortgage, and on April 27, 1894, filed a *lis pendens*, describing the property, and designating therein Armstrong and Daggs as defendants. After the filing of said *lis pendens* a deed from R. E. Daggs to A. L. Johns was recorded, on April 28, bearing date of March 17, 1894. On May 8, 1894, judgment for the amount of the debt, and a decree of foreclosure, were rendered; and on May 12th thereafter, by an order of the court, the sheriff seized the mortgaged property, and on June 6, 1894, sold the same, at which sale the plaintiff bid in the land, and, after receiving the sheriff's deed, attempted to take possession thereof. There had been to this time no visible change of possession from that formerly held by W. A. Daggs as tenant of R. E. Daggs, but the appellee's demand for possession under the sheriff's deed was resisted by W. A. Daggs, who claimed to have ceased on April 1st to be the tenant of R. E. Daggs, and to have become on that date the tenant of A. L. Johns, and to hold possession at this time as the tenant of A. L. Johns under the deed above referred to; Johns claiming to be the owner of the property by purchase prior to the commencement of the action, and not having been made a party thereto. Thereafter, on the twenty-second day of June, 1895, the appellee brought a supplemental action of foreclosure, making R. E. Daggs, W. A. Daggs, A. J. Daggs, and A. L. Johns parties, and alleging that the conveyance to Johns was fraudulent and void, and asking to have the same so declared and canceled, and a resale of the premises made; and the court on December 21, 1896, again rendered judgment against the defendants for the debt, and decree of foreclosure against the property, in favor of the appellee, and adjudged the deed dated March 17th, from Daggs to Johns, to have been fraudulent and void, and ordered that it be canceled and set aside. A personal judgment was also rendered against Daggs and Johns for any deficiency that might remain after the sale of the mortgaged property. The case was taken on a writ of error to this court, where the judgment was modified by omitting therefrom the personal judgment against Johns, on the grounds that the validity of the decree, as rendered in the judgment of December 21st, setting aside the deed from Daggs to Johns as fraudulent and void, rendered erroneous the decree granting a personal judgment for

the mortgage debt, or any part thereof, against Johns, as the grantee in such void deed; but this court affirmed the decree of the lower court, wherein it was "adjudged and decreed that the conveyance executed by R. E. Daggs to A. L. Johns, dated March 17, 1894, and recorded April 24, 1894, is fraudulent and void as against the appellee and against the aforesaid mortgage." No *supersedeas* having been granted, a resale of the premises was made under both this judgment of December 21, 1896, and the former judgment of May 8, 1894; and the appellee again bid in the property, and received in due time the sheriff's deed for the same. He was again met by refusal to deliver possession,—this time by P. P. Daggs, a brother of W. A. Daggs and R. E. Daggs, who claimed to be in possession as the tenant of the London Company, a grantee under a conveyance from A. L. Johns, who claimed title through the deed from Daggs, hereinbefore decreed to be fraudulent and void. Wilson, the appellee herein, then moved the court for a writ of assistance to put him in possession; setting forth the foregoing facts, and referring to the judgment of the court in both the foregoing causes. An order to show cause why such writ should not issue was served on P. P. Daggs, the tenant in possession. He filed in response thereto an affidavit alleging that, after the commencement of the aforesaid supplemental foreclosure suit, Johns had sold the land to the London Company, and that he (Daggs) was in possession as its tenant; also, that the London Company had, prior to the expiration of the equity of redemption, tendered to the attorney for the appellee and to one J. W. Evans, alleged to be an agent of the appellee, the amount necessary to redeem the premises from the second foreclosure sale. An affidavit of R. E. Daggs was also filed, alleging such tender to Thomas Armstrong, Jr., the attorney, and J. W. Evans, the agent, and the accompanying demand for a certificate of redemption by R. E. Daggs, as secretary of the London Company. Counter affidavits were filed by appellee, Wilson, alleging that no redemption had been tendered to him, or to any one for him, to his knowledge, and that neither the said Armstrong nor Evans had authority to accept redemption for him. On the appearance and answer of P. P. Daggs to the order to show cause, the aforesaid affidavits were presented and read, and the matter heard in open court; and upon such hearing

the court ordered that, no sufficient cause being shown to the contrary, and it appearing to the court that P. P. Daggs, the person in possession of the premises, and the London Company, for whom he claimed to hold possession as tenant, were holding said premises under said defendants, and with notice of the rights of appellee, Wilson, "the writ of assistance do issue to put the said Wilson in possession of the premises." From this order an appeal was taken by P. P. Daggs, and numerous errors assigned, but the appellant seems to rely chiefly upon three propositions: First, that the order was against the evidence and admitted facts; second, that the London Company (lessor of P. P. Daggs) and P. P. Daggs were innocent purchasers for value, without notice of plaintiff's claim; third, that the right of Wilson had been extinguished by a tender of the full amount for which the property had been sold.

An examination of the evidence and the facts in the case fails to sustain the first proposition relied on, or to authorize a disturbance of the decision of the lower court on that point.

The second proposition, that the London Company was an innocent purchaser for value, without notice of plaintiff's claim, and lessor to P. P. Daggs, and that the said P. P. Daggs was an innocent lessee, without notice of plaintiff's claim, is not sustained by the facts, as put in evidence, or the pleadings, which proved to the satisfaction of the lower court, and appear to this court conclusive, that the London Company had actual knowledge of the foreclosure suit against Johns and the Daggs brothers prior to its purchase of the property; that R. E. Daggs, one of the defendants in the foreclosure suit, was the secretary of the London Company at the date of such purchase; and that P. P. Daggs, by his own testimony, became the lessee of the London Company, and entered as such upon possession of the property on November 10, 1897, about one month after he attended as witness the tender by R. E. Daggs, as secretary of the London Company, of the money for the redemption of this property from the sale under foreclosure against R. E. Daggs, A. L. Johns et al.

This brings us to the third proposition, that Wilson's right had been extinguished by a tender of the amount for which the property had been sold under foreclosure. The law pro-

vides (Rev. Stats., tit. 26 [secs. 19-23, Act No. 20, Laws 1889]) that "upon a sale of real property, including sales under order of court, in foreclosure, the property is subject to redemption . . . by the judgment debtor, or his successor in interest, . . . within six months after the sale, on paying the purchaser the amount of his purchase, . . . and if the purchaser be also a creditor, having a prior lien, . . . the amount of such lien with interest. . . . If the debtor redeem, the effect of the sale is terminated and he is restored to his estate. . . . The payment mentioned . . . may be made to the purchaser or redemptioner, or for him to the officer who made the sale." The evidence does not show that the London Company, or any one for it, ever paid or tendered payment in redemption "to the purchaser, or for him to the officer who made the sale." There is evidence to show that it tendered payment of the amount for which the property had been sold, to two different parties, whom it desired to have represent the purchaser, but that these parties refused to accept the money, and claimed that they were not authorized to receive the money and act for the purchaser. Such tender does not meet the requirements of the law. The purchaser may not have been accessible, but the officer who made the sale was; and the law provides for redemption only by "payment to the purchaser, or for him to the officer who made the sale." The evidence therefore does not show the tender made to have been a valid and sufficient tender.

The record that was brought up in this case is very imperfect, and is insufficient to enable the court to pass upon some of the issues that are raised. As it is incumbent on the appellant to furnish to the appellate court the necessary record to enable it to determine the issues raised, it is proper that the rule should obtain that when that is not done the presumption is in favor of the regularity and correctness of the proceedings in the lower court. Neither of the judgments under which the sale was made appears in the record. It appears from the argument that the judgments were for about seven thousand dollars, while the tender claimed to have been made of the amount of the purchase price at the sale was for about two thousand dollars. The testimony given, or the proceedings had at the hearing on the return to the writ of assistance, are not given, other than some affidavits attached

to the record. The judge of the district court recites in the writ that the premises were sold April 10, 1897; that the sheriff's deed was executed October 14, 1897, "P. P. Daggs claiming to hold as tenant of the London Company, who, after hearing had, are found by the court to be holding the same under the said defendants, and with notice of the rights of said Wilson under said judgment and sheriff's deed, and subject thereto." From so much of the record as has been presented to us, it is not only possible, but the presumption is, that the court acted upon full information based upon evidence, which is not in the record on appeal. The record does disclose that the first suit was brought against J. S. Armstrong and R. E. Daggs to foreclose the mortgage, and that the second suit, against A. L. Johns, R. E. Daggs, W. A. Daggs, and A. J. Daggs, was supplemental thereto, and that judgment was rendered in each instance for the mortgage debt and interest; that the sheriff's sale was made April 10, 1897, by virtue of the two judgments, one rendered May 8, 1894, against J. S. Armstrong and R. E. Daggs, and the other rendered December 21, 1896, against A. L. Johns, R. E. Daggs, W. A. Daggs, and A. J. Daggs; that, the property not having been redeemed on October 14th, the sheriff's deed was executed, conveying to plaintiff, James Wilson, all the right, title, and interest therein of the said defendants, or any person claiming under them; that said Wilson had not at the time of application for the writ of assistance been let into possession, and that the said premises were in the possession of one P. P. Daggs, claiming to hold the same as tenant of the London Company, who, after hearing had, were "found by the court to be holding the same under the said defendants, and with notice of the rights of the said Wilson under said judgments and sheriff's deed, and subject thereto." "Ordinarily it is true that the decree of a court binds only the parties and their privies in representation or estate, but he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title, the litigating parties are exempted from taking any notice of the titles so acquired, and such a purchaser need not be made a party to the suit." 1 Story's Equity Jurisprudence, sec. 406. "A writ of assistance is an appropriate process to issue from a court of equity to place a pur-

chaser of mortgaged premises under its decree in possession after he has received the master's deed, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its direction, or other order of the court." *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634. The holder of a sheriff's deed for real estate purchased under a decree of foreclosure of a mortgage and a sale of the mortgaged premises has a right to a writ of assistance to procure possession of the premises purchased, as against all persons who were parties to the foreclosure suit, and all who hold under authority given by such parties after the commencement of such suit. *Watkins v. Jerman*, 36 Kan. 464, 13 Pac. 798, and cases cited. Upon what the court below based its findings could only be determined by an examination of the entire record in the case. For all this court can see, from so much of the record as has been presented to us, it is not only possible that it may have been proper to grant a writ of assistance in this case, but the presumption is that the lower court acted upon full information, based upon evidence which is not in the record on appeal, and found correctly that Daggs and the London Company were "holding possession under the defendants, and with notice of the plaintiff's rights under said judgments and sheriff's deed, and subject thereto." The holder of the sheriff's deed being in such case entitled to the writ of assistance, as granted, the order and judgment of the lower court are affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 666. Filed November 1, 1899.]

[59 Pac. 111.]

MARY R. HAFF, Plaintiff and Appellant, v. J. C. ADAMS,
Defendant and Appellee.

1. PRACTICE—JURY—PEREMPTORY INSTRUCTION—SIMILARITY TO DEMUR-
RER TO EVIDENCE—ROBERTS v. SMITH, 5 ARIZ. 368, 52 PAC. 1120,
FOLLOWED.—When it appears to the trial court that upon the
case made by plaintiff's evidence, all taken as true, the defendant

is not liable, the proper practice under the Arizona statute is for the court, upon motion, to instruct the jury to return a verdict for defendant. The motion for a peremptory instruction is substantially the same as the common-law demurrer to the evidence. *Roberts v. Smith*, *supra*, followed.

2. INNKEEPERS—GUESTS—BOARDERS—LIABILITY DIFFERENT TO EACH.—

- The strict liability of innkeepers exists only in favor of guests, and not in favor of boarders. As to guests, the liability of an innkeeper approximates that of an insurer; but for the goods of those who reside at the inn as boarders, rather than as guests, the innkeeper is liable only as any ordinary bailee for hire, and as such is only bound to use ordinary diligence.

3. SAME—EVIDENCE REVIEWED AND PLAINTIFF HELD A BOARDER—NEGLIGENCE—FAILURE TO PROVE.—In an action against a hotel proprietor for loss of jewelry from her rooms plaintiff testified that she had sold out her business in Kentucky, and had rented her home there, and had come to Phoenix to start her adopted son in business, and that she had made a bargain before she moved that she would pay one hundred and thirty-five dollars per month for certain rooms, board, and service, and that she selected the rooms and the furniture for the same, and that she had lived at the hotel six months, and had no other home. There was no evidence of any negligence on the part of defendant. *Held*, that plaintiff was a boarder, and was not entitled to recover in the absence of proof of negligence on the part of the defendant.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellant.

“The case should not be withdrawn from the jury unless the conclusion follows as a matter of law from the evidence, that no recovery can be had on any view which could properly be taken of the facts the evidence tends to establish.” *Texas Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Dunlap v. Northwestern R. R. Co.*, 130 U. S. 649, 9 Sup. Ct. 647; *Kane v. Central R. R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16; *Jones v. East Tenn. R. R.*, 128 U. S. 443, 9 Sup. Ct. 118; *Lewis v. Prien*, 98 Wis. 87, 73 N. W. 654; *Reid v. Kellog*, 8 S. D. 596, 67 N. W. 687; *Barbour v. Moore*, 25 Wash. L. R. 55; *Boyd v. Cross* (Tex. Civ. App.), 33 S. W. 1039; *Van Etten v. Edwards*, 48 Neb. 25, 66 N. W. 1013; *Phoenix Assoc. Co. v.*

Lucker, 77 Fed. 243; *Chicago etc. R. R. Co. v. Anderson*, 166 Ill. 572, 46 N. E. 1125; *Frame v. Electric Trac. Co.*, 180 Pa. St. 49, 36 Atl. 404; *Fraser v. Schroder*, 163 Ill. 459, 45 N. E. 288; *Cons. Coal Co. v. Schneider*, 163 Ill. 393, 45 N. E. 126; *Rogers v. Meinhardt*, 37 Fla. 480, 19 South, 878; *Florida etc. Co. v. Williams*, 37 Fla. 406, 20 South, 558; *Woelfel v. Federal St. etc. R. R. Co.*, 183 Pa. St. 213, 38 Atl. 592; *People v. People's Ins. Co.*, 126 Ill. 466, 18 N. E. 774; 2 L. R. A. 340.

In the case of *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198, 26 Pac. 1099, the court says: "The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest. Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay," etc. If then, as in the case last cited, the fact that the hotel was a public hotel raises the presumption that persons stopping at such hotel are guests, how is that presumption overcome in the case at bar? No evidence was offered by the defendant to overcome that presumption, and with that presumption remaining un rebutted in favor of the plaintiff, it alone is sufficient to support a verdict for plaintiff. *Magoffin v. Missouri Pacific R. R.*, 102 Mo. 540, 20 Am. St. Rep. 798, 15 S. W. 76. And in such case, under all the authorities above cited, it is error to direct a verdict for defendant.

It is contended by plaintiff that she was a guest at the hotel and not a boarder. "The distinction between a guest and a boarder is, that the former comes without any bargain as to the length of time he is to stay, and therefore may go when he pleases. A guest may remain a long time at an inn without becoming a boarder. He may contract to pay by the week or month without losing his character as a guest and assuming that of a boarder." Jones on Liens, 511; Storey on Bailments, 477; Redfield on Bailments, 577, 588; *Chamberlain v. Masterson*, 26 Ala. 371; *Jolie v. Cardinal*, 35 Wis. 118; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Ross v. Mellin*, 36 Minn. 421, 32 N. W. 172; *Hancock v. Rand*, 91 N. Y. 1; *Hall v. Pike*, 100 Mass. 495; *Strecroft v. Bailey*, 25 Iowa, 553; *Pollock v. Landis*, 36 Iowa, 651.

In order to constitute a person a guest it is not necessary

he should be an actual traveler. It is sufficient if he is a transient person and a temporary sojourner in the place, and is received and entertained at the inn or hotel as such. *Wall-ing v. Potter*, 35 Conn. 183; *Hancock v. Rand*, 91 N. Y. 1; *Hall v. Pike*, 100 Mass. 497.

The ultimate fact as to whether plaintiff was a guest or a boarder is always a question of fact for the jury. *Hall v. Pike*, 100 Mass. 495; *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198, 26 Pac. 1099; *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772; *Jolie v. Cardinal*, 35 Wis. 118; *Ross v. Mellin*, 36 Minn. 421, 32 N. W. 172; *Lusk v. Belote*, 22 Minn. 468; *Forsyth v. Hooper*, 11 Allen, 419.

C. F. Ainsworth, for Appellee.

The distinction made by the authorities between a boarder and a guest seems to be that if a person comes upon a special contract to board and sojourn at the inn he is not in the sense of the law a guest, but a boarder; but if he is a transient and wayfaring man, and stops at an inn and registers, he at once becomes a guest, and after becoming a guest should he make an agreement to pay by the week or the month it does not change his *status* as a guest so long as he retains his character as a traveler. Where a person, before going to a hotel or inn makes a special agreement for board by the month, and the time is indefinite but simply to be determined by his own volition, then and in every such case the person in the first instance becomes a boarder and retains his *status* as a boarder as long as he remains at the hotel or inn under such a contract. In the case at bar, the appellant never had any *status* as a guest, for the reason that in the first instance her acts in law constituted her a boarder. When she made a special contract before coming to the hotel, even before the hotel was a hotel, to take rooms at a special price, and, as we contend the evidence fairly shows, for at least a year, that fact alone constitutes her a boarder. *Moore v. Longbeach Dev. Co.*, 87 Cal. 483, 22 Am. St. Rep. 265, 26 Pac. 92; *Lawrence v. Howard*, 1 Utah, 142; *Manning v. Wells*, 9 Humph. 746, 51 Am. Dec. 688; *Kisten v. Hildebrand*, 9 B. Mon. 72, 48 Am. Dec. 416; *Johnson v. Reynolds*, 3 Kan. 251, 87 Am. Dec. 471; *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762; *Lusk v. Beloit*,

22 Minn. 468; *Horner v. Harvey*, 3 N. Mex. 197, 5 Pac. 329; *Handcock v. Rand*, 94 N. Y. 1, 46 Am. Rep. 112, and note; *Taylor v. Downey*, 104 Mich. 532, 53 Am. St. Rep. 472, 62 N. W. 716.

DOAN, J.—This action was brought by the appellant, Mary R. Haff, in the district court, against the appellee, J. C. Adams, to recover the sum of \$6,452 and interest thereon on account of certain jewelry and diamonds alleged to have been lost by the appellant while stopping at his hotel as a guest for hire, and while she was temporarily absent from her sleeping-room. The case was tried to a jury, and at the close of the evidence for the plaintiff the court, on motion of counsel for defendant, instructed the jury the bring in a verdict for the defendant; to which ruling the counsel for plaintiff excepted. On a verdict for the defendant, the court entered judgment in accordance therewith. From the judgment and the order denying a motion for a new trial, plaintiff appeals.

The evidence in the case furnished by the testimony of the plaintiff and her witnesses was to the effect that plaintiff and her adopted son came from Frankfort, Kentucky, to Phoenix, in the latter part of 1896; that defendant in that year erected and furnished the Hotel Adams in Phoenix; that the adopted son of the plaintiff had, in July, 1896, written the defendant, Adams, on behalf of himself and plaintiff, for rooms and permanent board in the Hotel Adams when finished, and suggested that plaintiff would prefer shipping her own furniture to furnish her rooms, and asked for terms accordingly. On plaintiff's arrival in Phoenix before the completion of the Hotel Adams, she visited the hotel, in company with the defendant, and selected the rooms she desired to occupy; selected the furniture with which, in addition to her own furniture, she desired to have them furnished, and before she took the rooms made a bargain that she should pay one hundred and thirty-five dollars per month, to be paid monthly, and to include board, service, and provisions; that she and her adopted son afterwards entered the hotel and occupied the rooms in question (at the contract price of one hundred and thirty-five dollars per month) from December 5th—the date of the opening of the hotel—until about the 30th of July the following year; that on the 1st of February, during her

temporary absence from her room, her diamonds and jewelry, to the value of \$6,452, were lost or stolen from the dresser in her room. Mr. Berryman, the adopted son, testified in behalf of the plaintiff that they had come from Kentucky in the fall of 1896, and that he had made his home in Phoenix, and had gone into business there, and that his home when in Phoenix was at the Hotel Adams, in the rooms mentioned, which he occupied jointly with the plaintiff, his foster mother; that from the fifth day of December, 1896, until they left the Hotel Adams, on the 30th of July, 1897, he was a boarder there; that neither he nor Mrs. Haff had any other home in Phoenix at that time. J. F. Pearce, the hotel clerk, a witness for the plaintiff, testified that the Hotel Adams accommodated transient guests and permanent boarders, and he stated that the plaintiff and her adopted son were among the latter class. The plaintiff herself testified that she had sold out her business in Kentucky, and entered into a partnership with and for her adopted son in Phoenix for two years; that she had a home in Frankfort, Kentucky, which she rented out by the month while she was absent in Arizona, and to which she expected to return at some future time; that she had come to Phoenix with her adopted son; had shipped her piano, harness, carriages, horse, and furniture: had started her adopted son in business, and was making her home with him while here. The plaintiff testified that the hotel was a first-class hotel, and that the service was proper and efficient; that the servants and employees were competent. At the conclusion of the plaintiff's evidence, on motion of defendant, the court instructed the jury that upon the evidence, if taken as true, the defendant was not responsible for the loss of the jewelry, and instructed the jury to return a verdict for the defendant, which instruction is assigned as error by the plaintiff and appellant.

The motion for a peremptory instruction to the jury to return a verdict for the defendant is substantially the same as the common-law demurrer to the evidence. It admits the truth of every ultimate fact which the evidence tends to prove. "The proper practice in such case under the Arizona statutes is by an instruction to the jury. When it appears to the trial court that upon the case made by plaintiff's evidence, all taken as true, the defendant is not liable; that, tak-

ing the evidence in its strongest light against the defendant, the plaintiff has presented no case in which he is entitled to recover,—the court may instruct the jury to return a verdict for the defendant.” *Roberts v. Smith*, 5 Ariz. 368, 52 Pac. 1120. “When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.” *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478. The principle is elementary that in all ordinary classes of bailments losses occurring without negligence on the part of the bailee fall upon the bailor. The bailee’s liability turns upon the presence or absence of negligence. Generally speaking, there can be no recovery against a bailee for loss of or damage to property in the absence of negligence. In some exceptional bailments—as in the case of carriers and innkeepers—there is an exceptional liability approximating that of an insurer. Hale on Bailments, 24. “As the law in regard to the liability of an innkeeper is one of extreme rigor, he should not be held to any responsibility beyond that arising from the relationship of innkeeper and guest. *Fisher v. Kelsey*, 121 U. S. 383, 7 Sup. Ct. 929, 30 L. Ed. 930. The determination of the question as to who are guests and who are boarders decides the nature of the liability imposed on innkeepers in given cases. The strict liability of innkeepers exists only in favor of guests, and not in favor of boarders. As to guests, the liability of an innkeeper approximates that of an insurer; but for the goods of those who reside at the inn as boarders, rather than as guests, the innkeeper is liable only as an ordinary bailee for hire, and as such is only bound to use ordinary diligence. An establishment may have a double character, being both a boarding-house and an inn. In respect to transient persons, who, without any stipulated contract, remain from day to day, it would be an inn; while as to those residing there under special contracts, it would be a boarding-house. Hale on Bailments, 262, and cases cited. “In this country, hotel-keepers act in a double capacity, being both innkeepers and boarding-house keepers. As innkeepers they entertain travelers and transient persons,—those who come without bargain

as to time and price, and go away at pleasure, paying only for actual entertainment received. As boarding-house keepers, they entertain residents and regular boarders for definite lengths of time, and at special prices, previously agreed upon." *Lawrence v. Howard*, 1 Utah, 142. In the case at bar, J. F. Pearce, one of the plaintiff's witnesses, testified directly that she was a regular boarder by the month. Her own testimony to the facts that she had sold out her business in Kentucky, and had rented her home there, and had come to Phoenix to start her adopted son in business, and that she had made a bargain, before she took the rooms, that she would pay one hundred and thirty-five dollars per month for the rooms, board, service, and provisions, and that she selected the rooms, and the furniture for the same, clearly supports that testimony, which is further strengthened by the testimony of her adopted son that from the fifth day of December until they left, in July, he was a boarder at the Hotel Adams, and that neither he nor she had any other home in Phoenix at that time. This testimony, being practically all the evidence on this point, establishes the fact beyond question that she was a boarder, and not a guest, in the eye of the law. To recover as a boarder, she must do so on the ground of negligence or want of diligence on the part of defendant. The only evidence on that point is that of plaintiff herself, and directly negatives that proposition. She says: "The hotel is first-class in every respect. The rooms were taken care of in good shape. The employees were as competent as any hotel employees."

It is urged by appellant that whether plaintiff was a guest or a boarder is an ultimate fact, to be deduced from the probative facts as given in the testimony, and that as to whether, in fact, the plaintiff was a guest or a boarder is always a question of fact for the jury. *Woollen Co. v. Proctor*, 7 Cush. 417, and *Magee v. Improvement Co.*, 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772. All the cases cited in support of this proposition are those in which the relations of innkeeper and guest had been originally assumed by the parties, and the defendant had introduced evidence to show that these relations had ceased, and the plaintiff had lost his *status* as a guest, and had become a boarder. The question then presented—whether a person once received as a guest at a hotel

loses his *status* as a guest and becomes a boarder by afterwards making or receiving special rates, or by changing mode of payment, or by a rule of the house relative thereto—would depend upon the different facts and circumstances, and their relative weight, effect, and bearing upon this question, and has been held to be an issue of fact, to be determined upon all the evidence in the case. In such cases the court or jury must determine from the different and conflicting probative facts presented, each tending to prove or disprove the ultimate fact in controversy, whether or not the ultimate fact was established. Such determination would be a determination of the weight and sufficiency of all the evidence to establish the ultimate controverted fact. In the case at bar the appellant never had any *status* as a guest, for, in the first instance, when she made a special contract before coming to the hotel, and afterwards came under that special contract to board and sojourn at the hotel, her acts, in law, constituted her a boarder (*Kisten v. Hildebrand*, 9 B. Mon. 72, 48 Am. Dec. 416; *Johnson Co. v. Reynolds*, 3 Kan. 251, 87 Am. Dec. 471; *Moore v. Development Co.*, 87 Cal. 483, 22 Am. St. Rep. 265, 26 Pac. 92), and the liability of the defendant was only that of an ordinary bailee, from whom she could only recover for the property lost on the ground of his negligence or want of diligence. There being no evidence whatever offered to establish negligence, the determination by the court that, upon the evidence offered, taken as true, the defendant was not responsible for the loss of the jewelry, was simply the determination “that, as a matter of law, no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish.” *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. This being unquestionably the prerogative of the court, the instruction was properly given. The judgment of the district court is therefore affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 617. Filed November 1, 1899.]

[59 Pac. 105.]

J. C. ADAMS et al., Defendants and Appellants, v. JAMES
O'CONNOR et al., Plaintiffs and Appellees.

1. **APPEAL AND ERROR—REVIEW—SCOPE OF—AMENDMENT—DISCRETIONARY.**—Leave to amend during trial is largely a matter of discretion, and where there is no exhibit of the original complaint, and the record fails to show the scope or effect of the amendment, it is not open to review.
2. **PLEADING—CONTRACTS—EVIDENCE—SUFFICIENCY.**—An averment that defendant promised to pay plaintiffs seven dollars per thousand for all brick laid up in the walls of an additional building, according to the terms of a certain contract (with no terms given, except the defendants' promise to pay and plaintiffs' agreement to furnish materials and perform the labor), states a cause of action.
3. **CONTRACTS—PAROL—EVIDENCE TO SUSTAIN—SUFFICIENCY—MOTION TO DISMISS.**—In an action upon an alleged parol agreement for extra compensation for certain brickwork, the evidence showed that there was a written contract providing for all the walls of the building, according to plans furnished by architects, and work sued for was included in said plans. *Held*, that a motion to dismiss for failure to prove any verbal contract should have been sustained.
4. **CONTRACTS—WRITTEN—CONSTRUCTION OF—FOR COURT AND NOT JURY.**—A contract for the erection of a certain building, provided that plaintiffs should furnish all material and do all the brickwork in the construction of said building according to the plans and specifications of the architects. It further provided that at the time of signing the plans and specifications were not yet completed, and that the plaintiffs were to furnish all the material and do all the brickwork in accordance with any plans to be furnished by said architects. The plans provided for the walls, for which plaintiffs claimed extra compensation by virtue of a parol agreement. *Held*, that when the terms and language of a contract are ascertained, in the absence of technical phrases or the existence of latent ambiguities, the office of interpreting its meaning belongs to the court alone, and the submission of it to the jury, for their interpretation and construction, was error.
5. **SAME—SAME—SAME—SAME—ACTION—TIME FOR COMMENCING.**—Where a building contract provides that a balance of twenty-five per cent is payable within sixty days after the work has been completed, inspected, and accepted by the architects, an action to recover the balance, brought before the expiration of said sixty days, is premature, irrespective of the refusal or acceptance of the work by the architects.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge. Reversed.

The facts are stated in the opinion.

C. F. Ainsworth, and Thomas D. Bennett, for Appellants.

Walter Bennett, and Joseph Campbell, for Appellees.

DOAN, J.—This action was brought by plaintiffs and appellees herein against J. C. Adams and wife, appellants herein, in the district court of Maricopa County, on the eleventh day of December, 1896, to recover \$3,131.04 and costs, for labor and material furnished under certain contracts in the construction of the Hotel Adams, in Phoenix, and the foreclosure of a mechanic's lien on the property for that amount. Two contracts are set out in the pleadings, called "Contract A" and "Contract B," dated on April 23d and June 2d, respectively, which specified minutely, and at considerable length, the terms and provisions under which all materials were furnished and labor performed. The plaintiffs alleged a further and verbal contract for labor and material beyond that covered by the written contracts hereinbefore mentioned, which was denied in the answer, the defendants claiming that the labor and materials were all provided for in the second written contract. The defendant J. C. Adams demurred to the complaint—First, on the ground that the allegations do not state facts sufficient to constitute a cause of action; second, that it appears on the face of the complaint, and from the contract attached thereto, which is a part thereof, that at the time of the commencement of this action there was nothing due on said contract, and that the action was prematurely brought.

The contract was made for "all brick laid in the walls of the building now being erected upon the corner of Center Avenue and Adams Street, and commonly known as the 'Hotel Adams,' upon the following terms and conditions," among which are: "The walls of said building, when completed, are to be measured," etc. "The parties of the first part agree to pay 75 per cent of the value of the brickwork that shall be laid in the walls, upon an estimate which shall

be furnished every two weeks by the architects, Millard & Creighton, and shall pay the full amount remaining due within sixty days after said work has been completed, inspected, and accepted, by said architects, Millard & Creighton. . . . The parties of the second part agree to furnish the brick to be laid in all walls in the above-mentioned building, and to lay them, according to the plans and specifications which shall be furnished to them by the said party of the first part or by the said architects, Millard & Creighton, for \$7 per thousand. Said walls to be measured when erected and completed," etc. "It is agreed by all the parties to this contract that the plans and specifications for said building are to be made by Millard & Creighton, architects, and that said plans at this date are not completed, and that the work shall be done in accordance with any plans furnished by said architects, and under their direction, and in a manner satisfactory to them,"—duly signed and sealed. The complaint alleged that all the conditions of contract A had been fully performed on the twenty-sixth day of September, 1896, except where plaintiffs had been delayed by delay or default of the defendants; that all the conditions of contract B had been performed on September 18, 1896, excepting cleaning down the walls, etc.; that all the conditions of the verbal contract were performed by plaintiffs prior to November 15th, and that on the eighteenth day of September, 1896, and repeatedly thereafter, until November 2d, plaintiffs applied to the architects, Millard & Creighton, to measure, inspect, and accept the work done under said contracts, and that the said architects unjustly and capriciously refused to measure up said work, and file an itemized declaration of the acceptance of the same; that, on the second day of November, Mr. Creighton, one member of the firm, did state to plaintiffs his approval and acceptance of the work done by plaintiff under said contracts; that the defendant J. C. Adams informed plaintiffs that he would not, at any time within sixty days after said date of acceptance, pay the balance due upon said contract; that the plaintiffs, on December 2, 1896, filed for record the contracts, together with an itemized account of the claim, as required by law, and served on defendant J. C. Adams a copy of said notice of lien; that the said J. C. Adams was the husband of said Anna D. Adams; and that, in all

matters relative to the building mentioned under the contracts in question, the said J. C. Adams acted for himself and as agent of said Anna D. Adams, and as such agent had been in charge and in control of said work and building. On the trial of the case, the demurrer of the defendants was overruled. The testimony of the plaintiffs, relative to the verbal contract and the intentions and understanding of the plaintiffs upon signing the written contract B, was admitted in evidence over the objection of the defendants. The court refused to construe the contract B, when requested by the defendants, on motion, so to do, and, over the objection of the defendants, submitted to the jury for their consideration and interpretation, the written contracts, and the testimony of the plaintiffs explanatory thereof, as well as the testimony in regard to the verbal contract. The entire case, including the written contracts, was submitted to the jury under eleven instructions given at the request of the plaintiffs, fifteen given at request of defendants, and five special questions submitted to the jury by the court. The jury returned specific answers to the questions submitted, and a general verdict for the plaintiffs, and assessed the damage at two thousand dollars, upon which the court entered judgment in accordance with the verdict, and decree of foreclosure of the lien upon the property; from which judgment and decree, and the denial of the motion for a new trial, the defendants appealed.

1. The first and second errors assigned are directed to the ruling of the trial court in permitting the plaintiffs, over defendants' objection, to amend their complaint on the trial, and after the plaintiffs had rested. These rulings will not be reviewed by this court. The amendment of pleadings during trial is largely a matter of discretion, and in this instance the amendment was by substitution, so that the record does not enable this court to determine the scope or effect of the amendments, there being no exhibit of the original complaint. The only text furnished in the record is of the complaint as it read after the last amendment, with no means of determining what constituted the original complaint, or what part of the text resulted from the first and second amendments, respectively.

2. It is next alleged that the court erred in denying defendants' motion to dismiss the action at the close of plaintiff's

case. This was practically a renewal of defendants' demurrer, but it goes somewhat further. The demurrer, although well taken as to the action on the contracts A and B, was properly overruled as to the verbal contract alleged in the complaint to have been made on October 10th, when the defendant J. C. Adams promised to pay plaintiffs "\$7 per thousand for all brick laid up in the walls of an additional building, according to the terms of said contract" (with no terms given, except the defendants' promise to pay, and plaintiffs' agreement to furnish materials and perform the labor). This contract, if sustained by the evidence, would have been sufficient to constitute a cause of action.

3. The motion to dismiss, made after the plaintiffs rested, was based upon the theory that the plaintiffs had failed to sustain by any evidence the alleged verbal contract; that the terms of the written contract would exclude the possibility of any such verbal contract. The plaintiffs alleged that all material furnished, and all labor performed, under said contracts, were done under the direction and supervision of the architects, Millard & Creighton, mentioned in said contracts A and B, and the special superintendent of said work, employed for the purpose by the defendant J. C. Adams, and that the said material and labor were duly accepted by the said architects and superintendent as the work under said contracts progressed, and without complaint or protest on the part of said architects or superintendent. Plaintiff O'Connor testified, in answer to the question, "What verbal contract did you have, if any, with Adams with reference to the building of the one-story kitchen?" "We were told that they were ready to start, and we went on and got the brick there. They told us to commence hauling the brick." On cross-examination he testified as follows: "We hauled brick on the ground for construction of the kitchen before Adams returned from Chicago, and before we were notified to go ahead with the work. We never said a word about the job. We were anxious to go on with it. Mr. Adams and Mr. Guthrie never said anything to us about the price, nor what we were going to charge, but we done this work without any stipulation, and we did not know whether we were going to get \$7 or \$10 per thousand, and Mr. Adams did not know anything about it. We charged them \$7 a thousand. Guthrie,

Adams, and myself measured up this when we completed the work, some time in November." Plaintiff Cottrell testified: "My recollection is we commenced the brickwork for the kitchen and dormitory in October. I do not remember Adams ever mentioning the kitchen to me personally." Defendant Adams testified positively that the contract B included the brickwork on the kitchen. The language of the contract is plain and direct, and included the brickwork in all the walls of the hotel building. The architects, Millard & Creighton, testified that the plans for the office and kitchen were a part of the plans for the building, and the plans and specifications as put in evidence sustained that testimony. The agreement in contract B, "that the plans and specifications are to be made by Millard & Creighton, architects, and that the work shall be done in accordance with any plans furnished by said architects," unquestionably disposes of this matter. Such being the case, the motion to dismiss should have been granted, and the refusal to grant it was error.

4. It is next claimed that the court erred in refusing to construe contracts A and B, set out in plaintiffs' complaint, when the contracts themselves were not ambiguous or uncertain, and in submitting the same for construction to the jury. The disposal of the proposition involved herein will render unnecessary the determination of many of the questions presented in the other assignments. The rule is well settled that when the terms and language of the contract are ascertained, in the absence of technical phrases, or the existence of latent ambiguities, rendering the subject-matter of the contract uncertain and doubtful, the office of interpreting its meaning belongs to the court alone. "It would be a dangerous principle to establish, where the parties have reduced their contracts to writing and defined their meaning by plain and unequivocal language, to submit their interpretation to the arbitrary and capricious judgment of persons unfamiliar with legal principles and the settled rules of construction." *Brady v. Cassidy*, 104 N. Y. 155, 10 N. E. 131. This contract is clear, free from ambiguities, and easily understood. The parties themselves have plainly expressed in writing what is included in the contract. The contract expressly provides that the plaintiffs shall furnish all material and do all the brickwork in the construction of the Hotel Adams, according

to the plans and specifications made by the architects, Millard & Creighton. Then they put a clause in the contract, that, at the time of signing this contract, the plans and specifications are not yet completed, but that the said plaintiffs are to furnish all the material and do all the brickwork in accordance with any plans to be furnished by said architects. The only question, then, that was pertinent under this contract, was as to what plans and specifications were adopted and furnished by these architects, Millard & Creighton, for the construction of the Hotel Adams. Whenever this was ascertained, then it was certain what work was to be performed by the plaintiffs on their part. It was perfectly competent and proper to admit testimony as to what constitutes the plans and specifications, but it was not competent to show what work the plaintiffs understood they were to perform at the time they signed the contract, or what portion of the plans they understood was not included in the contract, except as expressed in the contract itself; for, if this kind of testimony is admitted, it would abrogate the contract, and let the entire transaction rest on parol. The court should have construed this contract according to its plain provisions, as indicated by the words and terms used, and should have defined the rights and liabilities of the parties thereunder, and should have so instructed the jury, and should not have submitted the contract to the jury, to draw their own conclusions from it, and place their own construction on it. *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Barnhill v. Howard*, 104 Ala. 412, 16 South. 2; *Hassett v. McArdle*, 7 Misc. Rep. 710, 28 N. Y. Supp. 48. The contract being free from ambiguities, no exposition is allowable contrary to the express words of the instrument. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106. The plans and specifications, as put in evidence, provided for the walls of the kitchen and office. The architects identified these plans and specifications as the ones under which the building was constructed, and testified that the plans were drawn for them before contract B, under which the building was erected, was entered into. This testimony was uncontradicted. The court should therefore have construed contract B according to its plain terms and provisions, and should have instructed the jury that the walls of the office and kitchen were included

in the contract just the same as any of the other walls of the building. The refusal to do so, and the submission of the contracts to the jury for their interpretation and construction, was error.

It is next claimed that, in submitting the case to the jury, the court erred in refusing to hold, as a matter of law, that as to contract B, set out in plaintiffs' complaint, this action was premature, and to so instruct the jury. The contract provided that the defendants shall pay the plaintiffs seventy-five per cent of the value of the brickwork that shall have been laid in the walls, upon an estimate which shall be furnished by said architects every two weeks, and shall pay them the full amount remaining due within sixty days after said work has been completed, inspected, and accepted by said architects, Millard & Creighton. The evidence presented established the fact that seventy-five per cent of the value of the brickwork, as shown by the estimates of the architects, had been paid as required, and that the claim could exist for only the twenty-five per cent which would become due within sixty days after the work had been completed, inspected, and accepted by the architects. The plaintiff O'Connor testified that they completed the work some time in November,—about the 7th. The architect Millard gave the date as about the 15th of November. The testimony of all agreed that the work was measured up on the twenty-eighth day of November. Plaintiff O'Connor testified that he had a verbal acceptance of the building from the architect on the morning of November 28th; plaintiff Cottrell, that, some time about the 2d of November,—not positive as to exact date,—Mr. Creighton told him they were willing to accept the building as a good job. Millard & Creighton, the architects, both testified that they had never given a verbal or written acceptance of the work under that contract; that plaintiffs had demanded an acceptance, and the reason they had not given them an acceptance was that the work was not in accordance with the contract, and that was the only reason they refused to give an acceptance of the building; that the building was practically and substantially completed at the time of the measurement, November 28th, and they were willing to accept it as substantially completed, with the exception of some failures to comply with certain requirements in the contract, which were fully brought out

in the evidence, and which were the grounds for some allegations of breach of contract, failure to comply with requirements, and claims for damages on the part of defendants against plaintiffs, but are not material to this ruling. On November 30th the architects presented a letter or statement to the defendant Adams, stating that they could not accept the work; that it was not done in accordance with the contract, etc.; which letter, or statement, was by defendant presented to plaintiffs on that date. This action was brought December 11th. From this evidence, that is somewhat conflicting, the court might draw conclusions that would differ somewhat; but, as a matter of law, no recovery could be had upon any view which could be properly taken of the facts established by this evidence, because, upon the view most favorable to the plaintiffs that could possibly be taken, the sixty days had not expired, after either the completion, measurement, or acceptance of the work. While it might become material, in considering some other errors that have been assigned in this case, to determine whether, as a matter of fact, the architects did or did not accept the work, and, if the conclusion were arrived at that they did not accept it, then to determine whether such a case has been made showing the refusal to have been grossly and palpably perverse and unjust, so much so that the inference of bad faith and dishonesty would necessarily arise, and that thereby the plaintiffs would be entitled to establish by other proof that they had executed the work according to the contract, and could recover from the defendants, notwithstanding the refusal of the architects to certify, that issue is not pertinent here, because, in any event, they could not maintain a suit for the remaining twenty-five per cent until after the expiration of sixty days from that date; and the date of the suit (December 11th) shows that it was brought within less than sixty days from the earliest date given of either the completion of the work or the measurement of the building, and the action of the architects thereon, whether that may have been considered an acceptance or a refusal to accept. *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442. For the reasons assigned, the court should have held, as a matter of law, that the action as to contract B was prematurely brought, and should have so instructed the jury, and the refusal so to do was error.

The decision of the questions that have been determined renders unnecessary the consideration of the errors assigned in the different instructions given or refused to the jury, as the issues therein presented would not arise on the trial of the case in accordance with the views indicated herein. The judgment of the lower court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Sloan, J., and Davis, J., concur.

[Civil No. 672. Filed November 1, 1899.]

[59 Pac. 109.]

JASPER M. ROUNTREE et al., Defendants and Appellants,
v. ALEXANDER MARSHALL, Plaintiff and Appellee.

1. **FRAUDULENT CONVEYANCES—ACTION BY JUDGMENT CREDITOR TO SET ASIDE—PLEADING—SUFFICIENCY.**—In an action by a judgment creditor to cancel a conveyance by his debtor, an allegation that the conveyance was made for the purpose of hindering and delaying the plaintiff in the collection of the debt upon which the said judgment was rendered, and was without consideration, fraudulent, and void as to this plaintiff, is sufficient to sustain a judgment in the absence of a demurrer.
2. **SAME—EXECUTION—MAY BE LEVIED ON PROPERTY WITHOUT BRINGING ACTION TO CANCEL FRAUDULENT CONVEYANCE—REV. STATS. ARIZ. 1887, SEC. 2031, CONSTRUED.**—Under the statute, *supra*, an attempted transfer by a fraudulent grantor is ineffectual to divest him of the legal title, and a creditor may levy upon and sell the property as if no conveyance had ever been made by the debtor.
3. **SAME—EVIDENCE—SUFFICIENCY—FRAUDULENT INTENT OF VENDOR—VENDEE'S KNOWLEDGE OF INTENT.**—Where the evidence establishes the fraudulent intent of the debtor in making the conveyance, and the full knowledge of the vendee of such intent, a judgment canceling the conveyance will not be set aside.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

A. C. Baker, and J. L. B. Alexander, for Appellants.

C. F. Ainsworth, for Appellee.

DOAN, J.—This action was brought by the appellee herein on May 22, 1897, in the district court of Maricopa County, against the appellant and one Marcus Jacobs, to recover the possession of certain real estate, with the rents and profits thereof, stated to be worth the sum of fifty dollars per month, and asking that the title to the premises be quieted in the appellee, that he have possession thereof, and that a conveyance from one William Ruff to the appellant, Rountree, be declared fraudulent and void, and canceled as a cloud upon the title. The facts, as disclosed by the evidence, were as follows: The appellee had recovered a judgment in the district court of Maricopa County on April 6, 1895, against William Ruff, for the sum of \$3,200 and interest and costs. At the time the action was brought, Ruff was the owner of the property in question. After contracting the debt upon which the judgment aforesaid was rendered, and while the action therefor was pending, Ruff conveyed to the appellant, Rountree, all the property, real and personal, then owned by him. Afterwards, on January 8, 1895, Rountree conveyed a portion of the premises in question to the said Marcus Jacobs. Since the commencement of the present action, the said Jacobs has reconveyed the said property to Rountree. Upon the aforesaid judgment, rendered on April 5, 1895, against Ruff, an execution was duly issued, and levied upon the property now in question. The property was sold on execution under the judgment, and a deed issued to the appellee, Marshall. The complaint alleged that the conveyances by Ruff to the defendant Rountree, and by Rountree to Jacobs, were all made for the purpose of hindering and delaying the plaintiff (this appellee) from collecting his debt upon which the said judgment was rendered, as aforesaid, and that all said conveyances were without consideration, and fraudulent and void as to this appellee; that, at the time of the rendition of the judgment, the issuance and levy of the execution, and the sale of the premises, the said Ruff had no other property in this territory subject to execution. The appellant answered by general denial, and further alleged that on the first day of December, 1894, when the aforesaid transfer was made,

Ruff was indebted to him, the said Rountree, in the sum of \$2,261; that Ruff was indebted to one Haskell in the sum of \$1,076, which was secured by a mortgage on a portion of the described property, and to various other parties in divers sums and amounts; that on the first day of December, 1894, Ruff transferred the property in question to Rountree in payment of the aforesaid indebtedness of \$2,261, and in further consideration of the assumption and payment by Rountree of the aforesaid indebtedness to Haskell and others; that thereupon the said appellant, Rountree, canceled the indebtedness of Ruff to himself, paid the amount due Haskell, and caused the mortgage to be discharged, and paid other debts and accounts of the said Ruff. The case was tried upon the evidence introduced by both parties in the court below. The defendant Rountree gave in detail the facts and circumstances of the transaction between himself and Ruff, and thereupon the court found that upon April 6, 1895, the appellee herein recovered judgment against William Ruff for \$3,200 and costs; that the said Ruff was the owner of the property now in question at the time he contracted the debt for which the judgment was rendered; that, pending the action, the said Ruff, on December 1, 1894, conveyed to Rountree the property in question; that on July 17, 1895, an execution was issued on said judgment against the property of said Ruff, and returned unsatisfied; that thereafter an alias execution was issued and levied upon this property, and that, after due notice, the same was sold by the sheriff, and a deed therefor executed to Marshall, the appellee; that the conveyances from said Ruff to Rountree, and from Rountree to Jacobs, were all made for the purpose of hindering and delaying Marshall in the collection of the debt upon which judgment was rendered, and were all fraudulent and void as to Marshall, the appellee herein; that the purposes of the said conveyances and the fraudulent intent of Ruff were known to Rountree at the time the conveyances were made to him; that, at the time of the conveyance of said premises by Ruff to Rountree, a portion of the same was encumbered by a mortgage amounting to \$1,076; that since such conveyance the encumbrance had been paid and the mortgage satisfied by the said Rountree; the said Rountree had, ever since the conveyance, been in possession of the property; that the reasonable rent of said

premises, exclusive of the encumbered property aforesaid, was twenty-five dollars per month. Thereupon judgment was rendered in favor of the appellee, Marshall, and against the appellant, Rountree, for the immediate possession of the unencumbered portion of said property, and the sum of two hundred and fifty dollars for the use and occupation of the same, and costs, and that upon the payment of \$1,076 within ninety days from the date of said judgment by the appellee, Marshall, to the appellant, Rountree, the appellee have possession of that portion of the premises that had been encumbered by the said mortgage of \$1,076. The deeds from Ruff to Rountree and from Rountree to Jacobs were each and all adjudged to be fraudulent and void, and were set aside as a cloud upon the title of the appellee, Marshall, to the premises therein described, and it was ordered, adjudged, and decreed that, upon the payment of the \$1,076 aforesaid, the title to all said premises be quieted in the said appellee, Marshall. From this judgment, and the order denying a motion for a new trial, the defendant appealed, and assigns as errors—First, that the complaint does not state facts sufficient to constitute a cause of action, because of the insufficient allegation of fraud therein; second, because it appears that the title claimed by the sheriff's deed was only the "right, title, interest, and claim" had by Ruff in and to the lands on the sixth day of April, 1895, and that prior to that time Ruff had conveyed away said lands; third, that the evidence is not sufficient to warrant the conclusion of the court that the conveyance by Ruff to Rountree was fraudulent.

The complaint alleges "that the said conveyance by said Wm. Ruff to the defendant Jasper M. Rountree, and by the said Jasper M. Rountree to said M. Jacobs, were each and all of them made for the purpose of hindering and delaying this plaintiff in the collection of the debt upon which the said judgment was rendered, and were each and all of them without consideration, fraudulent, and void as to this plaintiff." Whatever might have been held if the point had been raised by demurrer to the complaint, the allegation is certainly sufficient to sustain a judgment, in the absence of a demurrer.

2. The next assignment is based upon the legal proposition that Ruff's deed of December 1, 1894, transferred his title to, and interest in, this property to Rountree, and that, until this

transaction should be attacked for fraud and such transfer be vacated or set aside, the legal title was in Rountree, and beyond the reach of legal process against Ruff, and that, therefore, the levy on, and sale of Ruff's title to and interest in, the property after such deed, and before any proceedings for the cancellation thereof, conveyed nothing to Marshall. If the transaction was voidable, that doctrine would apply. But a deed in fraud of the rights of creditors is absolutely void. Such a deed can convey no legal interest. Mr. Freeman says on this subject: "A transfer made to hinder, delay, or defraud creditors, while as between the parties it conveys the title, has as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may sell it under execution. The title transferred by such sale is not a mere equity; it is the legal title itself, against which the fraudulent transfer is no transfer at all." Freeman on Executions, sec. 136. This rule is especially enacted by statute in our territory. The Revised Statutes (par. 2031) provides: "Every transfer of any estate, real or personal, with intent to delay, hinder or defraud creditors of or from what they are or may be lawfully entitled to shall, as to such creditors, be void." The supreme court of California has decided, under a statute almost identical with ours, that the attempted transfer by the fraudulent grantor was ineffectual to divest him of the legal title, and vest such title in the grantee, and therefore did not place the grantor's title beyond the reach of legal process invoked in aid of a *bona fide* creditor of such fraudulent grantor, but that, such conveyance being void, a creditor, ignoring the ineffectual attempt of the fraudulent grantor to make such transfer, could levy upon and sell the property as if no conveyance had ever been made by the debtor. *Bull v. Ford*, 66 Cal. 176, 4 Pac. 1175; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286. Ruff's title never having been transferred as to the plaintiff Marshall, the levy upon and sale of such "right, title, and interest," under execution against Ruff, was, in effect, the levy upon and sale of the entire title to the land, notwithstanding the former attempted transfer by Ruff under the fraudulent deed of Rountree.

3. This brings us to the consideration of the proposition

that the evidence is not sufficient to warrant the conclusion of the court that the conveyance by Ruff to Rountree was fraudulent. The evidence is conclusive that Rountree was in this instance a fraudulent vendee. His own testimony furnished sufficient evidence of the fraudulent intent of Ruff in making the conveyance, and of his full knowledge of such intent, if not, indeed, of his active complicity with Ruff in the matter. In the language of the court, in the case of *Bartles v. Gibson* (C. C.) 17 Fed. 293: "The circumstances show that he must have known of the fraudulent intent of his grantor, and if so, or if he had knowledge of facts sufficient to excite the suspicion of a prudent man and put him on inquiry, he made himself a party to the fraud." There is nothing in the record that would call for a disturbance of the findings or judgment of the court below. The judgment is therefore affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 665. Filed November 1, 1899.]

[59 Pac. 101.]

A. E. BAKER, Plaintiff and Appellant, v. S. J. FLEMING
et al., Defendants and Appellees.

1. **VENDOR'S LIEN—MINES AND MINING—REAL PROPERTY.**—Where mining property is conveyed by a deed absolute, and no express lien is reserved for the unpaid portion of the purchase money, there is no implied equitable lien in favor of the vendor for such unpaid purchase price.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Ross & O'Sullivan, and E. M. Sanford, for Appellant.

Andrews & Ling, H. D. Stocker, of Counsel, for Appellees.

DAVIS, J.—On the fourteenth day of July, 1896, the appellant, A. E. Baker, sold and conveyed to S. J. Fleming and R. T. Tustin, by deed absolute, certain mining property situated in Yavapai County, receiving part of the purchase price thereof in cash and the written obligations of the said Fleming and Tustin for the residue. No express lien was reserved, however, for the unpaid portion of the purchase money. On or about the twentieth day of August, 1896, the Providence Gold Mining Company took a conveyance of said property from Fleming and Tustin, with full knowledge on its part of the existence of the said purchase-money indebtedness to Baker. Thereafter, in a suit brought by Baker, it was sought to establish and enforce a vendor's lien against the property for the balance of the purchase money owing to him. From the judgment of the district court denying his right to such lien he has prosecuted this appeal.

The sole question presented for decision here is whether a grantor of real estate by absolute conveyance has an implied equitable lien thereon for the unpaid purchase money. If such a lien arises at all, it must, on principle, prevail alike against the grantee himself and all subsequent purchasers with notice. The doctrine of the English court of chancery, which recognizes and upholds such a lien, has been adopted in some of the states, rejected in some, and remains undecided or doubtful in others. There seems to have been no settled adjudication of the question in this territory, and we therefore feel at liberty to determine it as one of first impression. A considerable diversity of opinion exists concerning the origin of the vendor's lien. It has been accounted for as a trust, as an equitable mortgage, as arising from natural equity, and as a contrivance of the chancellors to evade the unjust rule of the early common law by which land was free from the claims of simple contract-creditors. The grounds upon which the doctrine seems generally to have been rested in the earlier English cases were those of natural equity, a supposed intention of the parties, and a trust arising out of the unconscientiousness of the vendee's holding the land without paying the price. In *Ahrend v. Odiorne*, 118 Mass. 261, Mr. Justice Gray, now of the supreme court of the United States, after an elaborate examination of the question, concluded that the foundation of the doctrine was that justice

required that the vendor should be enabled, by some form of judicial process, to charge the land in the hands of the vendee, as security for the unpaid purchase money, and that the restriction of the doctrine to real estate suggested the inference that the court of chancery was induced to interpose by the consideration that by the law of England real estate could not be attached on mesne process, nor, except in certain cases, and to a limited extent, be taken in execution for debt. The learned judge rejected the theory of natural equity, because that would apply to a sale of chattels as well as of land; and the theory of a trust, as that would include too many other cases to which confessedly the doctrine had not been extended. The presumption of an intention of the parties is thus disposed of by Mr. Justice Gibson, in *Kauffelt v. Bower*, 7 Serg. & R. 64, 10 Am. Dec. 428: "The implication that there is an intention to reserve a lien for the purchase money in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass." Speaking of the nature of the vendor's lien, Mr. Justice Story, in *Gilman v. Brown*, 1 Mason, 191, Fed. Cas. No. 5,441, said: "It is a right which has no existence until it is established by the decree of a court in the particular case, and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner, and upon its own peculiar principles." In one of the earliest English cases which contains a discussion of the doctrine, Lord Eldon observed: "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know, without the judgment of a court, in what cases it would and in what cases it would not exist." *Mackreth v. Symmons*, 15 Ves. 329. "No other single topic belonging to the equity jurisprudence," says Mr. Pomeroy, "has occasioned such a diversity, and even discord, of opinion among the American courts as this of the grantor's lien. Upon nearly every

question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in different states, and sometimes even in the same state, are directly conflicting." 3 Pomeroy's Equity Jurisprudence, sec. 1251. The doctrine has, from the beginning, met with pronounced opposition in this country, and Mr. Pomeroy ventures the opinion "that the original grounds and reasons for admitting the grantor's lien do not exist here, and the lien itself is not in harmony with our general real-property law. The tendency both of our legislation and of our social customs is to make land a subject of commerce, and its transmission as free as possible; while the rights of grantors can be fully protected by mortgages, which, in nearly all the states, are widely different from the instrument bearing the same name in England." Investigation shows that the lien has either been condemned by the courts or legislated against in the following states: Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, South Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, and West Virginia. The supreme court of the United States has never enforced the lien except where in harmony with the jurisprudence of the state in which the action was brought. In *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393, that court, speaking through Mr. Chief Justice Marshall, said: "It is a secret, invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world, the vendee appears to hold the estate divested of any trust whatever, and credit is given to him in the confidence that the property is his own in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien." In *Akrend v. Odiorne*, *supra*, Mr. Justice Gray says: "The decisions in the courts . . . in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors, 8th Am. Ed., c. 19, suggest no reasons and afford no grounds why we should now, for the first time, adopt in this commonwealth a doctrine which has never been supposed by the profession to be in

force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by *bona fide* attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment or mesne process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them." In the main, the courts which have expressed disapprobation of the doctrine have based their decisions upon the ground that it is inconsistent with the general policy prevailing in this country of making all matters of title dependent upon record evidence. There is no statutory recognition of the doctrine in this territory. The common law of England is adopted and made the rule of decision for our courts "so far only as it is consistent with and adapted to the natural and physical condition of the territory, and the necessities of the people thereof, and not repugnant to, or inconsistent with . . . the laws of the territory, or established customs of the people." Rev. Stats., par. 2935. After giving to the question the deliberate consideration which its importance demands, we are forced to the conclusion that this principle of an implied lien for purchase money can have no just application in this territory. It is opposed to the policy of our legislation, which aims to make the title to real estate as simple and easily understood as possible, and to facilitate its transfer and improvement by discouraging all secret or latent equities, and requiring conveyances and encumbrances thereof to be made matters of public record. Here, our attachment law readily permits a debt to become a lien before judgment, and debts generally are a lien upon the lands of decedents. The doctrine being thus repugnant to our registration law, ill-suited to our condition, and by no means essential to the interests of justice, we ought not to adopt it. The judgment of the district court will be affirmed.

Street, C. J., and Doan, J., concur.

[Civil No. 694. Filed November 1, 1899.]

[59 Pac. 99.]

YAVAPAI COUNTY, Plaintiff and Appellant, v. M. H. McCORD et al., Defendants and Appellees.

1. **BONDS—COUNTY—INVALIDITY—CURED BY VALIDATING ACT OF CONGRESS—ACT OF CONGRESS, JUNE 6, 1896, AND TERRITORIAL ACT, MARCH 12, 1885, CITED—COCONINO COUNTY v. YAVAPAI COUNTY, 5 ARIZ. 385, 52 PAC. 1127, FOLLOWED.**—Congress having validated railroad-aid bonds theretofore issued by counties in Arizona, no original invalidity of bonds issued by a county under the Territorial Act, *supra*, nor of the act under which they were so issued, can be relied upon to prevent their being refunded.
2. **SAME—SAME—REFUNDING—DEMAND—SUFFICIENT IF MADE BY HOLDER—LAWS OF ARIZONA, 1891, ACT NO. 79, SEC. 7, CONSTRUED—BRAVIN v. MAYOR, ANTE, P. 212, 56 PAC. 719, FOLLOWED.**—As the act, *supra*, provides that “any person holding bonds, warrants or other evidence of indebtedness of the territory or any county, municipality or school district within the territory . . . may exchange the same for the bonds issued under the provisions of this act,” it is the duty of the commissioners to fund the outstanding indebtedness of a county upon a demand from the holders of the evidence thereof, although no such demand is made by the county.
3. **SAME—SAME—SAME—LOAN COMMISSIONERS—POWERS OF—ACT OF CONGRESS, JUNE 6, 1896, CONSTRUED—GAGE v. McCORD, 5 ARIZ. 227, 51 PAC. 977, FOLLOWED.**—The limit of January 1, 1897, mentioned in the act of Congress of June 6, 1896, authorizing the funding of all obligations outstanding, was intended to be restrictive only of the indebtedness which could be funded, and made the act applicable to such obligations as existed and were outstanding prior to that time, but did not terminate on that date the authority of the territorial officers to fund said obligations.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Herndon & Norris, for Appellant.

C. F. Ainsworth, Attorney-General, and T. W. Johnston, and L. H. Chalmers, for Appellees.

DAVIS, J.—By the provisions of an act of the legislative assembly of the territory of Arizona entitled “An act to aid in the construction of a railroad in Yavapai County,” approved March 12, 1885, there was authorized to be issued, on the faith and credit of Yavapai County, negotiable bonds in the amount of four thousand dollars per mile for the construction of a railroad from a point on the line of the Atlantic and Pacific Railroad, near Chino Station, in Yavapai County, to the city of Prescott, and thence to the northern boundary of Maricopa County. The Prescott and Arizona Central Railroad Company, accepting the provisions of this act, constructed a railroad, in accordance therewith, from a junction point near Chino Station to the city of Prescott, and received therefor the negotiable bonds of Yavapai County to the number of two hundred and ninety-two, and in the denomination of one thousand dollars each. Interest was paid on these bonds from the date of their issue, in 1886, to the year 1893, inclusive, and twenty-seven of said bonds were redeemed and paid by Yavapai County. On the seventeenth day of September, 1897, the territorial loan commissioners took up two hundred and three of said bonds in exchange for territorial funding bonds, and, so far as the record shows, the remainder of said original issue is still outstanding. On October 1, 1897, Yavapai County commenced an action in the court below to enjoin the defendants, who were, respectively, governor, secretary, and auditor of the territory, acting as loan commissioners, from funding or exchanging any of the aforesaid outstanding railroad bonds. The injunction was asked for upon three grounds, as stated in the amended complaint: First, that the act of the territorial legislature under which said bonds were issued was in conflict with the statutes of the United States, and that the said bonds are, for that reason, illegal and void; second, that no official demand had been made upon the loan commissioners by the authorities of Yavapai County for the funding of said bonds; third, that, under the act of Congress approved June 6, 1896 (29 Stats. 262), the power and authority of the loan commissioners to fund said bonds terminated on January 1, 1897. Upon the full hearing of the case, the lower court rendered judgment denying the injunction and dismissing the complaint, from which judgment the plaintiff has appealed to this court.

Inasmuch as the appellant rested his claim to equitable relief solely upon the grounds above stated, it follows that the relief sought was properly denied, unless the right thereto could be sustained upon some one or more of those grounds. Whether or not there is merit in any one of them is to be determined, in our judgment, by the correct interpretation of the several congressional and territorial funding acts. These acts have been recently reviewed and construed by this court in the cases of *Gage v. McCord*, 5 Ariz. 227, 51 Pac. 997; *Coconino County v. Yavapai County*, 5 Ariz. 385, 52 Pac. 1127, and *Bravin v. Mayor, etc.*, ante, p. 212, 56 Pac. 719, and all of the questions necessarily involved in the case at bar have been fully decided. In *Coconino County v. Yavapai County*, supra, the court, referring to these same bonds, said: "Whether or not the act of March 12, 1885, authorizing Yavapai County to issue bonds for the construction of said railroad, was within the power of the legislature to enact, or whether the bonds that were issued in pursuance of said act were originally valid or not, this court does not feel called upon to decide; for the view we take of the matter is that the validity of the bonds is to be determined by the act of Congress approved June 6, 1896, section 2 of which is as follows: 'That all bonds and other evidences of indebtedness heretofore funded by the loan commissioners of Arizona, under the provisions of the act of Congress approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded as in this act provided until January 1, 1897; provided, that nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded.' Under that act, all bonds which had been issued by virtue of the territorial legislative enactments were permitted to be funded in territorial funding bonds. The act of Congress aforesaid made valid all of the bonds which

were issued under the legislative act of March 12, 1885." In support of this construction, and as bearing upon the intention of Congress and the exigencies which the act of June 6, 1896, was designed to meet, the court, in that case, cited the memorial adopted by the territorial legislative assembly, in 1895, setting forth that, under various acts of the assembly, the counties were authorized to and did issue railroad-aid bonds, which were sold in the open market at their face value, and were then held at home and abroad by *bona fide* purchasers; that the validity of these bonds, though questioned, was acknowledged by the payment of interest thereon; that a repudiation of the same would work a great hardship to the holders and affect the credit of the territory; and therefore the legislative assembly urged upon Congress the propriety of passing such curative legislation as would protect the holders of all bonds issued under authority of its acts the validity of which had been acknowledged, and relieve the people from the disastrous effects of repudiation. Since the case of *Coconino County v. Yavapai County* was decided by this court the important features of this funding legislation have received interpretation from the highest judicial authority of the land. In *Utter v. Franklin*, 172 U. S. 416, 19 Sup. Ct. 183, which went from this court on appeal, Mr. Justice Brown, delivering the opinion, expressed the following views upon the effect to be given the congressional enactment of June 6, 1896: "Its evident purpose was to authorize the funding of all outstanding bonds of the territory and its municipalities, which had been authorized by legislative enactments, whether lawful or not, provided such bonds had been 'sold or exchanged in good faith, in compliance with the terms of the act of the legislature by which they were authorized.' The second section deals with the original bonds which had not been theretofore funded, and provides that all such as had been theretofore issued under the authority of the legislature, and which by the first section were authorized to be funded, should be confirmed, approved, and validated, and might be funded until January 1, 1897. We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at

that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify. . . . Construing this [act] in the light of the surrounding circumstances, and particularly in view of the memorial, it is entirely clear that it was intended to apply to bonds issued under authority of the legislature, and purporting on their face to be legal obligations of the county, whether in fact legal or not; and, to put the matter still further beyond question, they are expressly declared to be legal and valid." The bonds issued by Yavapai County under the act of March 12, 1885, having thus been since approved and validated by Congress, no original invalidity of the bonds, or of the legislative enactment under which they were issued, could be of any avail to the appellant in this case.

The point involved in the second ground upon which the appellant based his right to an injunction,—namely, that no official demand had been made upon the loan commissioners by the authorities of Yavapai County for the funding of these bonds,—was passed upon in *Bravin v. Mayor, etc., supra*, in which the court said: "The act of June 25, 1890 (being the act of Congress approving, with amendments, the funding act of Arizona), was utterly silent as to the right of the holder of any warrants or other outstanding indebtedness to compel either the municipal authorities or the loan commissioners to take any steps required for the funding of such indebtedness. It was doubtless for this reason that the Territorial Act of March 19, 1891, provided that 'any person holding bonds, warrants or other evidence of indebtedness of the territory, or any county, municipality or school district within the territory, . . . may exchange the same for the bonds issued under the provisions of this act,' etc. As the law stood, therefore, after March 19, 1891, it was the duty of the loan commissioners to fund the outstanding indebtedness of municipalities—First, upon the official demand of municipal authorities; second, upon the application of the holders of such outstanding bonds, warrants, and other evidences of indebtedness as had not been funded." A demand from the holders alone upon the loan commissioners for the funding of these Yavapai County railroad bonds would have been sufficient,

in itself, to have entitled the holders to an exchange of such bonds for territorial funding bonds, and this seems to have been the view taken of these provisions of the law by the supreme court of the United States in *Utter v. Franklin*.

3. The question as to whether or not the act of June 6, 1896, placed a limitation upon the time in which the loan commissioners could exercise their funding powers, was fully considered in the case of *Gage v. McCord*, *supra*, and in that case we held that the limit of January 1, 1897, mentioned in the act was intended to be restrictive only of the indebtedness which could be funded, and made the act applicable to such obligations as existed and were outstanding prior to that time, but that it did not terminate on that date the authority of the territorial officers to fund said obligations. We do not understand that this construction is inconsistent with any views expressed by the supreme court of the United States in the case of *Utter v. Franklin*. Upon none of the grounds stated in his amended complaint could the appellant have been entitled to the relief prayed for, and the injunction was properly refused. The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 681. Filed November 1, 1899.]

[59 Pac. 103.]

THE GLENDALE FRUIT COMPANY, a Corporation, Defendant and Appellant, v. C. T. HIRST, Plaintiff and Appellee.

1. ACCOUNT—ASSIGNMENT—SUFFICIENCY—DUE-BILL. — Where due-bills were intended as, and were in form an assignment of the claims for which they were given, the assignee may maintain suit thereon.
2. MASTER AND SERVANT—TERMINATION OF RELATION—ACTION BY SERVANT AGAINST MASTER FOR WAGES DOES NOT NECESSARILY OPERATE AS.—While an employee by bringing suit puts himself in an antagonistic attitude to his employer which might be held to terminate the relation, the action of the employer in recognizing the employee as manager and superintendent and his performance of the duties,

after suit filed, operates to continue in force his contract, and entitles him to recover his salary at the agreed price.

3. ATTACHMENT—JUDGMENT—TO WHAT EXTENT ENFORCED.—It appearing that no intervening rights of third persons are injuriously affected thereby, it is proper to adjudge and foreclose a lien against property seized under a writ of attachment for the full amount of the judgment, though this amount be in excess of that set up in the affidavit of attachment, personal service being had upon the defendant.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Hamilton & Armstrong, for Appellant.

C. F. Ainsworth, for Appellee.

SLOAN, J.—The appellee, C. T. Hirst, brought suit in the court below against the appellant, the Glendale Fruit Company, a corporation, to recover the sum of \$1,661.14, upon three several causes of action, on the fourth day of January, 1898, the first of which charged the defendant company with an indebtedness of \$375, due for salary as manager and superintendent of the defendant company's fruit ranch, situate in the county of Maricopa, at the agreed and stipulated sum of \$125 per month for the months of October, November, and December of the year 1897. The second cause of action charged an indebtedness in the sum of \$1,199.75, due from the defendant in the action on account of various sums paid out and expended by the plaintiff in the action to various and divers persons at different times and dates, at the request of the defendant, between the first day of March, 1897, and the first day of January, 1898. The third and last cause of action charged an indebtedness of \$116.39, due the plaintiff from the defendant for and on account of an assigned claim of Hatcher & Hurley, due for meats delivered to the said defendant company by said Hatcher & Hurley prior to the first day of January, 1898. At the time of the commencement of the action, the plaintiff, Hirst, made affidavit setting up the foregoing items of indebtedness due from the defendant, and

obtained a writ of attachment against the property of the defendant in the sum of \$1,661.14, which said writ of attachment was thereupon levied upon certain personal property and certain real estate comprising the defendant's fruit ranch, all situate in said county and territory. On March 4, 1898, the plaintiff, Hirst, filed an amended complaint, in which his first cause of action was enlarged and extended so as to include a claim for salary at the agreed sum of \$125 per month from the first day of October, 1897, up to the time of the filing of his amended complaint; and further setting forth that, in addition to said salary, the defendant company agreed to furnish him with a suitable house to live in with his family during the continuance of said contract. In the second cause of action, as set up in the amended complaint, the plaintiff charged an indebtedness in the sum of \$2,135.59 for and on account of various sums paid by him at the instance and request of the defendant company for and on account of various sums due and owing from said defendant company to various persons at different times between the first day of December, 1896, and the time of filing said amended complaint. In his third cause of action set up in the amended complaint the plaintiff, Hirst, claimed an indebtedness due from the defendant to him in the sum of one hundred dollars for expenses incurred in plowing, cultivating, and taking care of defendant's fruit ranch between the first day of March, 1898, and the time of filing the amended complaint. The defendant company, in its answer, filed its general denial, and by way of further answer set up at various times after the first of December, 1896, up to the time of the filing of the answer, the plaintiff had sold and applied upon his alleged claim sufficient property of the defendant to pay off and discharge in full all claims and demands of the plaintiff against the defendant set up in plaintiff's amended complaint. The defendant, in its answer, set up specifically various amounts and sums received by the plaintiff out of the proceeds of the property of the defendant, amounting in all to the sum of \$5,487.24; and further set up that various other sums and amounts should be so credited against the plaintiff and in favor of the defendant, which the defendant was unable to specify in detail for the alleged reason that the plaintiff had been in the exclusive charge, control, and possession of the

property of the defendant, and had concealed from the defendant his disposition of the same. By way of counterclaim the defendant set up in its answer that the plaintiff, Hirst, while in the possession and control of the fruit ranch of the defendant, and while pretending to act as superintendent and manager thereof, on or about December 14, 1896, received for account of the defendant a draft in the sum of \$415.36, to be by him used and applied in the care and keeping of said ranch and property as directed by the defendant company; that the plaintiff, Hirst, neglected and failed to use and apply the same for the use of the defendant, and had failed and refused to account for or pay over and return the said sum to the defendant upon the request of defendant; on the contrary, had converted the same to his own use. And by way of a second and further counterclaim the defendant set up that between the first day of December, 1896, and up to and including the first day of March, 1898, the plaintiff was in charge of the defendant's fruit ranch and business, as superintendent and manager thereof; that between the first day of December, 1896, and the time of the filing of the answer, the plaintiff had disposed of the products of said ranch, and the property of the defendant situate thereon, and had collected various sums aggregating the amount of \$5,071.88, and had failed, neglected, and refused to account to the defendant for said sums so received by him, or to pay over any of said sums so received to the defendant. The defendant prayed judgment against the plaintiff upon said counterclaims in the sum of \$5,487.24. The cause was tried by the court without a jury, and judgment rendered for the plaintiff in the sum of \$2,704.46. The judgment provided for the foreclosure of the attachment lien against the property levied upon under the writ of attachment for the full amount of the judgment, together with the costs of the action, of which amount the sum of \$1,957.59, with \$66.40 costs, was adjudged a lien on the personal and real property levied upon from the time of the levy, and the sum of \$746.87 was adjudged a lien upon said property from the fourth day of March, 1898, being the date of the filing of plaintiff's amended complaint. The defendant company moved for a new trial, which was denied, and brings this appeal from the order denying said motion, and from the judgment rendered in the cause.

Numerous assignments of error are made by counsel for appellant in their brief. Among other matters, it is contended by appellant that the court erred in receiving testimony relating to certain items of the plaintiff's account which had not been paid by him, but for which he had merely given due-bills, and which items had not been assigned to him. An inspection of the record discloses the fact that these due-bills were intended as, and were in fact in form, such an assignment of the claims for which they were given as to give the plaintiff the right to maintain suit thereon.

It is also contended that the court erred in receiving evidence as to the services rendered by the plaintiff under his contract with the defendant company after the fourth day of January, 1898, when the original complaint was filed in the action, for the reason that the plaintiff in the action by thus bringing suit had put himself in an antagonistic relation to the defendant company, and had thereby terminated his agency and severed his connection with the company as its manager and superintendent. The testimony, however, tends to show that, notwithstanding the suit, plaintiff remained in charge of the ranch of the defendant company, and transacted the affairs of the company, with full knowledge on the part of the company, and received and carried out the instructions of the officers of the company with reference to the management and control of the fruit ranch and business of the defendant company, in the same manner and to the same extent as he had previous to the commencement of the action. Whatever otherwise, therefore, might have been the effect of the plaintiff's action in bringing suit, in terminating his relations to the company as its agent and superintendent, the action of the company and its officers in recognizing plaintiff as manager and superintendent of the ranch after his action, and his performance of the duties required by his contract as such manager and superintendent, operated to continue in force and effect his contract, and entitled him to recover salary at the agreed price.

It is also contended that the court erred in decreeing a lien by virtue of the attachment against the property of the company for the full amount of the judgment recovered, for the reason that this amount was in excess of that set up in the affidavit of attachment, and for which suit was originally

brought in the original complaint filed in the action. While it is undoubtedly true that, as between a judgment creditor and third persons who are creditors of the judgment debtor, no lien can be established and enforced in excess of the amount set up in the affidavit, and for which the writ is issued, an examination of the authorities has convinced us that the rule is otherwise where personal service is had upon the defendant in the action, and the judgment rendered upon the merits, and the interests of third parties are not affected thereby. The cases cited by counsel for the appellant are not in point. *Rowley v. Berrian*, 12 Ill. 199, was a case in which there was no personal appearance by the defendant, but judgment was rendered upon the amended complaint for a larger sum than that called for in the writ of attachment and declaration. The case of *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295, was a case wherein the property of a non-resident of the state was seized under attachment, and no personal service had upon the defendant. In the latter case the court based its ruling that no judgment could be rendered nor any lien established in excess of the sum called for in the affidavit which was the basis of the writ of attachment, upon the ground that the attachment proceedings were necessary to give the court jurisdiction to render any judgment against the defendant or his property. In the present action the attachment proceedings were, under the statute, wholly ancillary, and no jurisdictional question is presented. Under the statute the officer serving the writ is required to seize and levy upon so much property of the defendant as may be necessary to satisfy the amount specified in the writ. In the absence of intervening rights and equities of third parties, in what way or in what manner can a defendant be injured should the court render judgment in excess of the amount specified in the affidavit of attachment and in the writ, and foreclose the lien of the attachment for the full amount of the judgment against the property so levied upon? We know of none. The authorities are ample to sustain the action of the court in adjudging and foreclosing a lien against the property seized under the writ of attachment for the full amount of the judgment, it appearing that no intervening right or equity of any third person is injuriously affected thereby. *Syracuse City Bank v. Coville*, 19 How. Pr. 385; *Searle v. Preston*, 33 Me. 214.

The remaining assignments of error we have considered, but none of them present reversible error. Judgment of the court below is affirmed.

Doan, J., and Davis, J., concur.

MEMORANDUM DECISIONS.

[Civil No. 640.]

CHARLES GRANVILLE JOHNSTON et al., Appellants, v.
GEORGE W. ROLSTON et al., Appellees.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. J. J. Hawkins, Judge.

Allen R. English, Attorney for Appellants.

Charles S. Clark, Attorney for Appellees.

January 11, 1899. Dismissed.

[Civil No. 657.]

CHARLES DE GROFF, Plaintiff in Error, v. ROBERT A.
WAGNER, Defendant in Error.

WRIT OF ERROR from the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge.

No appearance for Plaintiff in Error.

Charles Blenman, Attorney for Defendant in Error.

January 11, 1899. Affirmed.

[Civil No. 691.]

J. F. DUNCAN, Administrator of the Estate of P. H. Kraner, Deceased, Appellant, v. PABLO B. SOTO, Executor of the Estate of John C. Falls, Deceased, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge.

Rochester Ford, Attorney for Appellant.

Barnes & Martin, Attorneys for Appellee.

January 14, 1899. Affirmed on stipulation.

[Civil No. 630.]

THOMAS L. WISWALL et al., Appellants, v. TABOR
MINES AND MILLS COMPANY et al., Appellees.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. A. C. Baker,
Judge.

Thomas Armstrong, Jr., and Joseph Campbell, Attorneys
for Appellants.

C. F. Ainsworth, Attorney for Appellees.

January 19, 1899. Affirmed.

[Civil No. 680.]

M. ROSENBERG, Appellant, v. THE PHOENIX WHOLE-
SALE MEAT COMPANY, a Corporation, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
Judge.

Joseph H. Kibbey, Attorney for Appellant.

Hamilton & Armstrong, Attorneys for Appellee.

January 19, 1899. Dismissed.

[Civil No. 683.]

THE ANGLO-AMERICAN CANAIGRE COMPANY, a
Corporation, Appellant, v. O. SUGETA, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
Judge.

No appearance for Appellant.

Joseph H. Kibbey, Attorney for Appellee.

January 19, 1899. Affirmed.

[Civil No. 684.]

THE ANGLO-AMERICAN CANAIGRE COMPANY, a
Corporation, Appellant, v. S. TANAKA, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
Judge.

No appearance for Appellant.

Joseph H. Kibbey, Attorney for Appellee.

January 19, 1899. Affirmed.

[Civil No. 685.]

THE ANGLO-AMERICAN CANAIGRE COMPANY, a
Corporation, Appellant, v. H. IMATO, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
Judge.

No appearance for Appellant.

Joseph H. Kibbey, Attorney for Appellee.

January 19, 1899. Affirmed.

[Civil No. 686.]

THE ANGLO-AMERICAN CANAIGRE COMPANY, Ap-
pellant, v. H. EGI, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
Judge.

No appearance for Appellant.

Joseph H. Kibbey, Attorney for Appellee.

January 19, 1899. Affirmed.

[Civil No. 687.]

THE ANGLO-AMERICAN CANAIGRE COMPANY, Appellant, v. H. HIRASU, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

No appearance for Appellant.

Joseph H. Kibbey, Attorney for Appellee.

January 19, 1899. Affirmed.

[Civil No. 688.]

THE ANGLO-AMERICAN CANAIGRE COMPANY, Appellant, v. I. MASUI, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

No appearance for Appellant.

Joseph H. Kibbey, Attorney for Appellee.

January 19, 1899. Affirmed.

[Civil No. 689.]

THE ANGLO-AMERICAN CANAIGRE COMPANY, Appellant, v. IKE K. MIYALO, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

No appearance for Appellant.

Joseph H. Kibbey, Attorney for Appellee.

January 19, 1899. Affirmed.

[Civil No. 673.]

J. M. WARD, Appellant, v. **FREDERICK BALSZ et al.**,
Appellees.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

Joseph H. Kibbey, Attorney for Appellant.

William A. Hancock, Attorney for Appellees.

January 31, 1899. Dismissed.

[Criminal No. 130.]

L. T. SCOTT, Appellant, v. **TERRITORY OF ARIZONA**,
Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge.

George J. Stoneman, C. T. Clark, and Owen T. Rouse,
Attorneys for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

February 2, 1899. Dismissed.

[Civil No. 656.]

WILLIAM M. BILLUPS, Appellant, v. **SETH J. JOHNSON et al.**, Appellees.

APPEAL from the District Court of the Third Judicial District in and for Maricopa County. A. C. Baker, Judge.

R. E. Daggs, and A. J. Daggs, Attorneys for Appellant.

W. H. Stilwell, and Joseph Campbell, Attorneys for Appellees.

February 2, 1899. Affirmed.

[Civil No. 692.]

CHARLES ZEIGER et al., Plaintiffs in Error, v. H. F. McGOVERN, Defendant in Error.

WRIT OF ERROR from the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge.

No appearance for Plaintiffs in Error.

R. E. Morrison, Attorney for Defendant in Error.

February 2, 1899. Affirmed.

[Civil No. 633.]

THE OWENS WATER COMPANY, Appellant, v. THE SAGINAW SOUTHERN RAILROAD COMPANY, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Mohave. R. E. Sloan, Judge.

Edmund Burke, Attorney for Appellant.

E. M. Doe, and C. M. Frazier, Attorneys for Appellee.

February 2, 1899. Dismissed for want of prosecution.

[Criminal No. 129.]

JUAN SOTO, Appellant, v. TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge.

A. Orfila, Attorney for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

February 2, 1899. Affirmed.

[Criminal No. 135.]

JOHN BETIS, Appellant, v. TERRITORY OF ARIZONA,
Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge.

George W. Swain, Attorney for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

February 10, 1899. Affirmed.

[Civil No. 641.]

THE NATIONAL BANK OF ARIZONA, Appellant, v.
D. L. MURRAY, Treasurer and ex officio Tax-Collector
of Maricopa County, Appellee.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

Joseph Campbell, for Appellant.

Walter Bennett, for Appellee.

SLOAN, J.—This was an action brought by the National Bank of Arizona to restrain D. L. Murray, as treasurer and *ex officio* tax-collector of Maricopa County from proceeding to collect, by sale of the bank's property, the taxes as assessed against the said bank for the year 1897. Judgment was rendered against the bank, from which judgment the bank has appealed. The contention on the part of appellant involves two propositions which were considered and passed upon in the case of *Banking Co. v. Murray* (decided at this term of the court), *ante*, p. 215, 56 Pac. 728, namely: 1. The regularity of an assessment of the shares of stock of a bank in the name of the bank; 2. If irregular, whether such an irregularity is sufficient to warrant the equitable interference by injunction to restrain the collection of the taxes upon such shares of stock so assessed. In the case referred to we held that, while the assessment of the shares of stock in the name

of a bank was irregular, yet it was not such an irregularity as would avoid the tax, or call for the interference of a court of equity; and upon authority of this case the judgment of the district court is affirmed.

Davis, J., and Doan J., concur.

Opinion filed March 15, 1899.

[Civil No. 674.]

MESA CITY BANK, a Corporation, Appellant, v. D. L. Murray, Treasurer and ex officio Tax-Collector of Maricopa County, Appellee.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

W. J. Kingsbury, for Appellant.

Thomas E. Flannigan, for Appellee.

SLOAN, J.—Upon the authority of the case of *Banking Company v. Murray* (decided at this term of the court), *ante*, p. 215, 56 Pac. 728, which involved the same propositions raised by the record in this case, the judgment of the lower court is affirmed.

Doan, J., and Davis, J., concur.

Opinion filed March 15, 1899.

[Civil No. 675.]

FARMERS' AND MERCHANTS' BANK, a Corporation, Appellant, v. D. L. MURRAY, Treasurer and ex officio Tax-Collector of Maricopa County, Appellee.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

W. J. Kingsbury, for Appellant.

Thomas E. Flannigan, for Appellee.

SLOAN, J.—The judgment of the lower court in this case is affirmed upon the authority of *Banking Company v. Murray* (decided at this term), *ante*, p. 215, 56 Pac. 728; the questions considered and determined in that case being conclusive of the propositions involved in this case.

Doan, J., and Davis, J., concur.

Opinion filed March 15, 1899.

[Civil No. 655.]

A. J. DAGGS et al., Plaintiffs in Error, v. THOMPSON
WALKER et al., Defendants in Error.

WRIT OF ERROR from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. A. C. Baker, Judge.

A. J. Daggs, for Plaintiff in Error.

Walter Bennett, for Defendants in Error.

PER CURIAM.—We find the record in this case very much the same as we found the record of proceedings in the case of *Johns v. Bank* (just decided), *ante*, p. 290, 56 Pac. 725. We find the writ of error in this case to be directed to the sheriff, instead of to the defendant in error. We also find that this cause was on appeal to the supreme court in the January term of 1898, and upon motion of appellee was dismissed; that immediately upon dismissal of the appeal, a writ of error was sued out. For these reasons, on the authority of the case of *Cadman v. Copper Company*, 4 Ariz. 413,¹ and upon the authority of *Johns v. Bank*, *supra*, the writ of error is dismissed.

Opinion filed March 15, 1899. Dismissed, 46 L. Ed. 1262.

¹No written opinion.

[Civil No. 667.]

JOSEPH L. GIROUX, Appellant, v. GEORGE H. SCHUERMAN, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge.

Herndon & Norris, Frank E. Corbett, and John J. Hawkins, Attorneys for Appellant.

F. E. Brooks, T. W. Johnston, and W. H. Barnes, Attorneys for Appellee.

March 16, 1899. Dismissed by consent.

[Civil No. 626.]

J. H. HAMPSON, Appellant, v. FRANK DYSART, Appellee.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge.

Barnes & Martin, for Appellant.

John McGowan, District Attorney, and Lovell & Satterwhite, for Appellee.

PER CURIAM.—The appellant, J. H. Hampson, brought suit in the court below against the appellees, Frank Dysart, treasurer and *ex officio* tax-collector of Graham County, and Arthur Wight, sheriff and *ex officio* assessor of said county, to enjoin the collection of certain taxes alleged to have been illegally assessed against him for the year 1896, upon personal property. This case was submitted upon the same briefs and abstract, and is conceded to involve the same questions, as that of *Hampson v. Adams* (decided at the present term), *ante*, p. 335, 57 Pac. 621. For the reasons given in the opinion in that case, the judgment here appealed from is also affirmed.

Opinion filed June 2, 1899.

[Civil No. 639.]

THE WESTERN INVESTMENT BANKING COMPANY,
a Corporation, Appellant, v. A. A. LONG, Appellee.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

J. B. Woodward, for Appellant.

Walter Bennett, for Appellee.

SLOAN, J.—The record in this case presents a question as to the power of the city of Phoenix to assess and tax, in the name of a bank, its shares of stock. Upon the authority of *National Bank v. Long* (just decided), *ante*, p. 311, 57 Pac. 639, in which we held that the act of the legislature, known as act No. 51, Laws of 1897, authorizing the taxation of shares of stock of banking institutions by counties, did not apply to cities, and that there was no other provision of law authorizing such tax, the judgment of the court below will be reversed, with instructions to enter its judgment granting the relief prayed for in the complaint.

Davis, J., and Doan, J., concur.

Opinion filed June 2, 1899.

[Civil No. 697.]

C. E. LYNCH, Appellant, v. SAMUEL W. PRICE, Respondent.

APPLICATION for a Writ of Prohibition to the District Court of the Second Judicial District, in and for the County of Graham. F. M. Doan, Judge.

Moorman & McFarland, Attorneys for Appellant.

Frank B. Laine, Attorney for Respondent.

June 2, 1899. Writ denied.

[Civil No. 644.]

SANTA FE, PRESCOTT AND PHCENIX RAILWAY COMPANY, a Corporation, Appellant, v. F. L. BRILL, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

T. W. Johnston, L. H. Chalmers, and W. C. Campbell, Attorneys for Appellant.

Baker & Bennett, Attorneys for Appellee.

November 1, 1899. Dismissed on stipulation.

[Civil No. 645.]

THE SANTA FE, PRESCOTT AND PHCENIX RAILWAY COMPANY, a Corporation (being cases 3039, 3040, 3116, and 3117, consolidated), Appellant, v. F. L. BRILL, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

T. W. Johnston, and L. H. Chalmers, Attorneys for Appellant.

Baker & Bennett, Attorneys for Appellee.

November 1, 1899. Dismissed on stipulation.

[Civil No. 708.]

C. E. GUNN, Plaintiff in Error, v. OLD DOMINION COPPER MINING AND SMELTING COMPANY, Defendant in Error.

WRIT OF ERROR from a judgment of the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge.

No appearance for Plaintiff in Error.

Edwards & Edwards, for Defendant in Error.

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APPEAL AND ERROR.

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7. **APPEAL AND ERROR—EVIDENCE—OBJECTIONS TO—NOT WITHIN ISSUES—NOT RAISED BY GENERAL OBJECTION—STIPULATIONS—WAIVER OF OBJECTION—PLEADINGS—SUFFICIENCY—VARIANCE.**—In an injunction case brought by appellee against appellant, counsel for appellant objected to the admission of certain testimony on the ground that it was "immaterial, irrelevant, and incompetent." The question that no issue was made by the pleadings which rendered the testimony admissible was not raised. At the close of the injunction case, counsel for appellant stipulated in open court that said testimony, in so far as applicable, should be considered by the court and taken as proof in a second case brought by appellant against appellee from the judgment in which this appeal is taken. The record does not show that the court in ruling upon the objections

APPEAL AND ERROR (Continued).

made in the injunction case did so with reference to the state of the pleadings in this case, and appellant, having failed to save an exception to the admission of testimony given in the former case relating to the subject-matter of this action on the ground of insufficient allegations in the pleadings, should have, as a part of his stipulation, raised the point, and not waited until after the court's decision. Had the pleading been so defective as not to support judgment, no objection or exception thereto was necessary to save the point. An inspection shows, however, that it is sufficient in this respect, no matter how great the variance between the allegations and proof may have been, as it clearly states a cause of action. (*Walker v. Gray*, 359.)

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APPEAL AND ERROR (Continued).

discovered, this court will proceed to render such judgment as the district court should have rendered. (*Egan v. Estrada*, 248.)

13. APPEAL AND ERROR—MOTION TO DISMISS—FAILURE TO FILE PAPERS—NOT JURISDICTIONAL—TIME MAY BE EXTENDED ON GOOD CAUSE SHOWN.—A motion to dismiss a writ of error, on the ground that no abstract of the record had been filed on the first day of the term, or at all, relates to a rule of court as to the time of filing papers, which can be extended, when good reason is shown, to accommodate delinquent parties, that justice may be done. (*Johns v. Phoenix Nat. Bank*, 290.)
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APPEAL AND ERROR (Continued).

17. **APPEAL AND ERROR—NECESSITY FOR WRITTEN OPINION—REV. STATS. ARIZ. 1887, PAR. 948, CONSTRUED—NOT JURISDICTIONAL.**—The statute, *supra*, providing that "the opinion in all cases which are reversed and remanded for a new trial shall be in writing," does not apply to a case where the judgment is reversed without being remanded for a new trial. Nor is there anything in the statute, *supra*, which makes the filing of an opinion in any case a jurisdictional prerequisite to the entering of a valid and enforceable judgment. (*Arhelger v. Mutual Life Ins. Co.*, 245.)
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29. **APPEAL AND ERROR—REVIEW—EVIDENCE—SUFFICIENCY—WEIGHT AND PREPONDERANCE.**—Where there is evidence tending to prove every material fact necessary to be found to sustain the judgment of the district court, it is not the province of this court to weigh it or decide upon its preponderance. (*Old Dominion etc. Co. v. Andrews*, 205.)
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APPEAL AND ERROR (Continued).

31. **APPEAL AND ERROR—REVIEW—SCOPE.**—The refusal of the court to set aside the sheriff's sale of property under foreclosure will not be reviewed on an appeal from an order distributing and awarding the surplus received at such sale. (*Scott v. Hurley*, 85.)
32. **SAME—RECORD—FAILURE TO PRESERVE ALL EVIDENCE—PRESUMPTIONS—SUFFICIENCY OF FINDINGS.**—Where the record fails to preserve all the evidence it must be presumed that the evidence was sufficient to support the findings, and where the findings fully support the order of distribution made by the court below it will be affirmed. (*Scott v. Hurley*, 85.)
33. **APPEAL AND ERROR—REVIEW—SCOPE OF—AMENDMENT—DISCRETIONARY.**—Leave to amend during trial is largely a matter of discretion, and where there is no exhibit of the original complaint, and the record fails to show the scope or effect of the amendment, it is not open to review. (*Adams v. O'Connor*, 404.)
34. **APPEAL AND ERROR—SECOND APPEAL—JUDGMENT ON FIRST APPEAL NOT SUBJECT TO REVIEW.**—A judgment of an appellate court in a case becomes the law of the particular case, and is not subject to review thereafter on second appeal. (*Snyder v. Pima County*, 41.)
 See Criminal Law, 1, 2, 4; Equity, 9, 11, 12; Husband and Wife, 1; Landlord and Tenant, 2; Master and Servant, 3; Mines and Mining, 24; Pleadings, 14, 15; Taxes and Taxation, 3.

APPEARANCE.

Appearance, general, prevents question of jurisdiction of trial court on appeal. See Appeal and Error, 21.

See Marriage and Divorce, 1.

APPROPRIATION. See Irrigation, 1, 2, 3, 4, 8.

ASSAULT.

With intent to commit murder. See Criminal Law, 3.

ASSESSMENT. See Taxes and Taxation, 1, 2, 3, 4, 5.

ASSESSMENT—WORK.

Resumption of prevents forfeiture. See Mines and Mining, 6.

See Mines and Mining, 8, 9.

ASSIGNMENT.

Due bill, when sufficient to operate as. See Account, 1.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. **ASSIGNMENTS FOR BENEFIT OF CREDITORS—FAILURE TO ANNEX INVENTORY—REV. STATS. ARIZ. 1887, PARS. 22, 23, AND 31, CONSTRUED—**

ASSIGNMENTS FOR BENEFIT OF CREDITORS (Continued).

DOES NOT INVALIDATE ASSIGNMENT.—A general assignment for the benefit of creditors shall be construed to pass his estate, whether particularly specified or not, and is not void for want of an inventory of the estate annexed thereto as provided by paragraph 23, *supra*, paragraph 31, *supra*, providing that no assignment shall be void for want of such inventory or list. (Babbitt Bros. v. Mandell Bros., 95.)

ASSIGNMENTS OF ERROR.

General, call for no direct ruling. See Appeal and Error, 3.

Must be specific. See Appeal and Error, 27.

Necessity for. See Appeal and Error, 4.

Sufficiency. See Appeal and Error, 6.

Where outside of record and supported wholly by affidavit of counsel may not be regarded. See Appeal and Error, 20.

ATTACHMENT.

1. **ATTACHMENT—JUDGMENT—TO WHAT EXTENT ENFORCED.**—It appearing that no intervening rights of third persons are injuriously affected thereby, it is proper to adjudge and foreclose a lien against property seized under a writ of attachment for the full amount of the judgment, though this amount be in excess of that set up in the affidavit of attachment, personal service being had upon the defendant. (Glendale Fruit Co. v. Hirst, 428.)
2. **ATTACHMENT—LEVY—RANGE CATTLE—LAWS ARIZ. 1889, ACT NO. 20, SEC. 9, SUBD. 3, CONSTRUED—CHattel MORTGAGE.**—Where the sheriff in making a levy of attachment upon range cattle fails to serve at the time any notice of such levy upon the owner or his herder or agent, and fails to file any such notice with the county recorder as required by statute, *supra*, such levy created no lien, and a chattel mortgage made and filed by the owner to the interveners subsequent to the attempted levy was a good and valid prior lien upon said cattle, though the provisions of the statute regarding the levy of an attachment were thereafter complied with. (Menager v. Farrell, 316.)
3. **ATTACHMENT—LEVY—RANGE STOCK—LAWS 1889, ACT NO. 20, SEC. 9, SUBD. 3, CONSTRUED—NOTICE OF LEVY MUST BE RECORDED TO PERFECT LIEN.**—A levy of a writ of attachment upon range stock, made under the statute, *supra*, creates no lien until a copy of the notice required to be served on the owner, attached to the writ, has been filed with the county recorder. (Steinfeld v. Menager, 141.)

ATTORNEY.

Prejudicial remarks by before jury not contained in record will not be reviewed. See Appeal and Error, 25.

ATTORNEY'S FEES. See Interest, 1.

BAILEE. See Claim and Delivery, 6.

BANKS AND BANKING.

1. **BANKS AND BANKING—WHAT CONSTITUTES A BANK—WITHIN LAWS 1897, ACT No. 51, SEC. 1.**—A corporation engaged in the business of receiving money, investing it for its depositors by loaning it in their names, collecting rents, and interest due on such loans as it makes, which interest and rents are subject to check by those for whom collected; and which charges commission on its loans and also a commission on the collection of interest and rents, is a banking association within the meaning of the statute, *supra*. (Western Investment etc. Co. v. Murray, 215.)

See Taxes and Taxation, 6, 11, 12.

BILLS OF EXCEPTION.

Necessity for. See Criminal Law, 4.

See Appeal and Error, 10.

BOARDERS. See Innkeepers, 1, 2.

BONDS.

1. **BONDS—COUNTY—INVALIDITY—CURED BY VALIDATING ACT OF CONGRESS—ACT OF CONGRESS, JUNE 6, 1896, AND TERRITORIAL ACT, MARCH 12, 1885, CITED—COCONINO COUNTY V. YAVAPAI COUNTY, 5 ARIZ. 385, 52 PAC. 1127, FOLLOWED.**—Congress having validated railroad-aid bonds theretofore issued by counties in Arizona, no original invalidity of bonds issued by a county under the Territorial Act, *supra*, nor of the act under which they were so issued, can be relied upon to prevent their being refunded. (Yavapai County v. McCord, 423.)
2. **SAME—SAME—REFUNDING—DEMAND—SUFFICIENT IF MADE BY HOLDER—LAWS OF ARIZONA, 1891, ACT No. 79, SEC. 7, CONSTRUED—BRAVIN V. MAYOR, ANTE, P. 212, 56 PAC. 719, FOLLOWED.**—As the act, *supra*, provides that "any person holding bonds, warrants or other evidence of indebtedness of the territory or any county, municipality or school district within the territory . . . may exchange the same for the bonds issued under the provisions of this act," it is the duty of the commissioners to fund the outstanding indebtedness of a county upon a demand from the holders of the evidence thereof, although no such demand is made by the county. (Yavapai County v. McCord, 423.)
3. **SAME—SAME—SAME—LOAN COMMISSIONERS—POWERS OF—ACT OF CONGRESS, JUNE 6, 1896, CONSTRUED—GAGE V. MCCORD, 5 ARIZ. 227, 51 PAC. 977, FOLLOWED.**—The limit of January 1, 1897, mentioned in the act of Congress of June 6, 1896, authorizing the funding of all obligations outstanding, was intended to be restrictive only of

BONDS (Continued).

the indebtedness which could be funded, and made the act applicable to such obligations as existed and were outstanding prior to that time, but did not terminate on that date the authority of the territorial officers to fund said obligations. (*Yavapai County v. McCord*, 423.)

See Office and Officers, 1, 2, 4; Statutory Construction, 2.

BURDEN OF PROOF. See Criminal Law, 6; Injunction, 5; Landlord and Tenant, 12; Mines and Mining, 12.

CAPITAL STOCK.

Defined. See Corporations, 2.

CAUSES OF ACTION. See Office and Officers, 5, 6.

CERTIFICATE. See Live-Stock Sanitary Board, 1.

CHATTEL MORTGAGE. See Attachment, 2.

CITIZENSHIP. See Mines and Mining, 15, 16.

CLAIM AND DELIVERY.

1. **CLAIM AND DELIVERY—PLEADING—ANSWER DEFECTIVE—FAILURE TO TENDER ISSUE—POSSESSION—WAIVER—CURED BY JUDGMENT.**—Where the answer in an action of claim and delivery denied the allegation of plaintiff's ownership, but did not deny the allegation that he was entitled to the immediate possession of the property, and plaintiff made no attempt before or at the trial to take advantage of the defect, but, on the contrary, tried the case as though his right of possession was in issue, the defect in the answer, under these circumstances, was cured by the judgment. (*Hall v. Southern Pacific Co.*, 378.)
2. **SAME—JUDGMENT—RIGHT TO RETAIN PROCEEDS PENDING REFUND OF CHARGES—EVIDENCE.**—Plaintiff replevied property from a railroad company, paying the freight charges. At the trial, it was admitted that the property had been sold, and that its value was four hundred and sixty dollars plus the freight charges. The judgment, in the alternative for the return of the property or for the payment of four hundred and sixty dollars, was not error, nor was plaintiff entitled to retain the proceeds until the freight charges were refunded, as the property could not be returned, and the money judgment took into consideration the freight charges. (*Hall v. Southern Pacific Co.*, 378.)
3. **SAME—FINDINGS—SUFFICIENCY—TITLE IN THIRD PARTIES—IMMATERIAL.**—Findings in an action of claim and delivery that plaintiff

CLAIM AND DELIVERY (Continued).

was not the owner nor entitled to the possession of the property are sufficient to support a judgment for defendant, and further findings, not warranted by the pleadings, that the title was in third parties are immaterial. (Hall v. Southern Pacific Co., 378.)

4. **SAME—EVIDENCE—MUST RECOVER ON STRENGTH OF HIS OWN TITLE.**—A plaintiff in replevin must recover upon the strength of his own title or right of possession, and, in case he fails to establish his title or right of possession, the defendant is entitled to be restored to his possession. (Hall v. Southern Pacific Co., 378.)
5. **SAME—SAME—ESTOPPEL.**—Plaintiff in replevin, to prove his title and right of possession, gave evidence of a sale of the property to him under execution against J. C. Goodwin. Defendant sought to prove title in the brothers of Goodwin. Plaintiff, to establish an estoppel against the brothers claiming title, testified that in another suit, wherein the brothers were plaintiffs and himself defendant, plaintiffs gave a cost-bond, with J. C. Goodwin as surety, and that J. C. Goodwin, in justifying, testified that he was the owner of this property. One of the brothers denied that either of them was present, and testified that the property belonged to them continuously since prior to the time of the latter suit. The record failed to show that the cost-bond was approved, or what relation the suit in which execution was issued against Goodwin bore to the suit in which the cost-bond was filed, or that the brothers had any knowledge of the representations, or that an advantage to the brothers or a prejudice to the plaintiff resulted therefrom. Upon the record there was no error in the court refusing to find an estoppel. (Hall v. Southern Pacific Co., 378.)
6. **SAME—BAILEE—RIGHT OF POSSESSION—LIMIT OF RECOVERY—LEVY v. LEATHERWOOD, 5 ARIZ. 244, DISTINGUISHED.**—As against one who neither had title nor the right to the possession, a bailee may maintain replevin for the possession of the property which is the subject of the bailment, and may recover its full value from such stranger who may have unlawfully converted it, holding the amount so recovered in excess of his own interest in trust for his bailor. (Hall v. Southern Pacific Co., 378.)
7. **SAME—DAMAGES—JUDGMENT FOR VALUE NOT WITHIN THE MEANING OF DAMAGES AS USED IN REV. STATS. ARIZ. 1887, PAR. 202.**—A judgment in claim and delivery for the value of the property taken is not a judgment for damages, as that term is used in paragraph 202, *supra*, which provides that "the court or jury must assess the value of the property taken, and the damages for taking and detaining the same." (Hall v. Southern Pacific Co., 378.)

COLOR OF TITLE. See Tenancy in Common, 1, 2, 3.

COMMISSION. See Mines and Mining, 18.

COMMON-LAW ACTION.

1. **COMMON - LAW ACTION — WHAT CONSTITUTES — JURY — TRIAL BY — RIGHT TO—**REV. STATS. U. S. SEC. 2326, ACT OF CONGRESS, MARCH 3, 1881, 21 STATS. AT LARGE, 505, REV. STATS. U. S., SEC. 1868, AND AMENDMENT, SUPP. REV. STATS. U. S. 1874-1881, P. 13, [SUPP. REV. STATS. U. S. 1891, P. 7,] CITED AND CONSTRUED—JORDAN v. DUKE, 4 ARIZ. 278, 53 PAC. 197, APPROVED.—An action on an “adverse” filed in the land office to contest the right of an applicant for United States patent, as provided for in United States statute, *supra*, is not a common-law action within the purview of section 1868, and amendment, *supra*, p. 7, 1891, providing that “No party shall be deprived of a right to trial by jury in cases cognizable at common law.” (Providence Gold Min. Co. v. Burke, 323.)

COMPLAINT.

Sufficiency, where objection first raised on appeal. See Appeal and Error, 5; Master and Servant, 3.
See Corporations, 4, 5; Pleadings, 5.

COMPROMISE. See Equity, 2.

CONFIRMATION.

Defined. See Equity, 5, 6.

CONSIDERATION. See Landlord and Tenant, 4.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW — JURY — VERDICT — CONCURRENCE OF NINE JURORS—**ACT NO. 51, LAWS OF ARIZONA, 1891, NOT IN CONFLICT WITH SEC. 1868, REV. STATS. U. S., AND AMENDMENT, SUPP. REV. STATS. U. S., 1874-1881, P. 13 [1891, P. 7.]—Section 1868 and amendment, *supra*, apply only to common-law actions, and therefore it is not error for the court to receive the verdict of nine jurors in an action on an “adverse,” act No. 51 of the Laws of Arizona of 1891 making the concurrence of three fourths of a jury of twelve persons sufficient to render a verdict in all trials of civil cases and misdemeanors. (Providence Gold Min. Co. v. Burke, 323.)
See Statutory Construction, 1.

CONSTRUCTION.

Of written contract, for court and not for jury. See Contracts, 4, 5.

CONSTRUCTIVE NOTICE. See Mines and Mining, 5.

CONTINUANCE.

1. **CONTINUANCE—AMENDED PLEADINGS — SURPRISE — GRANTING DISCRETIONARY—SIMILAR ACTION BETWEEN SAME PARTIES REPRESENTED BY**

CONTINUANCE (Continued).

SAME ATTORNEY AND INVOLVING MUCH OF THE EVIDENCE IN THE PRESENT CASE.—The refusal of the trial court to grant a continuance upon the motion of plaintiffs and appellants alleging surprise and inability to proceed with the trial in an action to quiet title to mining ground because of the filing of an amended answer setting up the location of two claims which, if established, would render plaintiffs' location void, is discretionary, and will not be reviewed, where it appears that the parties and attorneys were identical with those in a similar action, tried but a few months before, wherein a large part of the evidence affecting the present case was introduced. (*Jordan v. Schuerman*, 79.)

CONTRACTS.

1. **CONTRACTS—PAROL—EVIDENCE TO SUSTAIN—SUFFICIENCY—MOTION TO DISMISS.**—In an action upon an alleged parol agreement for extra compensation for certain brickwork, the evidence showed that there was a written contract providing for all the walls of the building, according to plans furnished by architects, and work sued for was included in said plans. *Held*, that a motion to dismiss for failure to prove any verbal contract should have been sustained. (*Adams v. O'Connor*, 404.)
2. **CONTRACTS—TIME ESSENCE OF—REASONABLE TIME—DISTINCTION.**—The distinction between a contract in which time is of the essence and a contract in which time is not made of the essence is, that strict performance is required of the terms of the former within the time specified, where such performance is possible, and the latter is regarded only as requiring that its terms be performed within a reasonable time. (*Monihon v. Wakelin*, 225.)
3. **SAME—SAME—SPECIFIC PERFORMANCE—FAILURE TO PERFORM—CAUSED BY OTHER PARTY—ACCIDENT—DUE DILIGENCE—WITHOUT INJURY TO OTHER PARTY—INJURY—TEST.**—Where it appears that by act of the other party, or by unavoidable accident, such as could not be foreseen and guarded against, the performance of a contract of which time is of the essence even with the exercise of due diligence was rendered impossible, and the party at the earliest opportunity performed his part of the contract, the court will enforce it, provided the parties be left in the same relative position they would have been in had not delay occurred in the performance of the contract according to its terms. In determining whether the contract can under such circumstances be enforced without injury, the test is not that the one party may be able to profit by the failure of the other, but rather that he does not lose an advantage which he would have had had no failure occurred. (*Monihon v. Wakelin*, 225.)
4. **CONTRACTS—WRITTEN—CONSTRUCTION OF—FOR COURT AND NOT JURY.**—A contract for the erection of a certain building, provided that plaintiffs should furnish all material and do all the brickwork

CONTRACTS (Continued).

in the construction of said building according to the plans and specifications of the architects. It further provided that at the time of signing the plans and specifications were not yet completed, and that the plaintiffs were to furnish all the material and do all the brickwork in accordance with any plans to be furnished by said architects. The plans provided for the walls, for which plaintiffs claimed extra compensation by virtue of a parol agreement. *Held*, that when the terms and language of a contract are ascertained, in the absence of technical phrases or the existence of latent ambiguities, the office of interpreting its meaning belongs to the court alone, and the submission of it to the jury, for their interpretation and construction, was error. (*Adams v. O'Connor*, 404.)

5. **SAME—SAME—SAME—SAME—ACTION—TIME FOR COMMENCING.**—Where a building contract provides that a balance of twenty-five per cent is payable within sixty days after the work has been completed, inspected, and accepted by the architects, an action to recover the balance, brought before the expiration of said sixty days, is premature, irrespective of the refusal or acceptance of the work by the architects. (*Adams v. O'Connor*, 404.)

See Equity, 1; Irrigation, 5, 6, 7; Master and Servant, 1, 2, 3, 4; Mines and Mining, 10, 11; Pleadings, 6; Sureties, 1; Vendor and Vendee, 1.

CONVEYANCE. See Homestead, 1, 2.

CORPORATIONS.

1. **CORPORATIONS—ADVANCES—SUBROGATION.**—Where plaintiff advanced all the funds used by a corporation of which he is the chief stockholder, he is entitled to be subrogated to the rights of the corporation. (*Henry v. Mayer*, 103.)
2. **CORPORATION—CAPITAL STOCK—SHARES OF STOCK—DEFINED.**—Capital stock is the property of the corporation; shares of stock are the property of the individual holders thereof. (*Western Investment etc. Co. v. Murray*, 215.)
3. **CORPORATION—FOREIGN—CARRYING ON BUSINESS—SINGLE TRANSACTION—REV. STATS. ARIZ., TIT. 12, CHAP. 7, CONSTRUED.**—The doing of a single act of business within the territory of Arizona by a foreign corporation not incorporated for the purpose of carrying on business in this territory does not constitute the carrying on of business within the meaning of the statute, *supra*, providing that every act done by a foreign corporation, incorporated for the purpose of engaging in or carrying on business within this territory, prior to compliance with requirements as to filing its articles, etc., shall be void. (*Babbitt v. Field*, 6.)
4. **CORPORATIONS—STOCKHOLDERS' SUITS—IRRIGATION—PLEADING—COMPLAINT—CAUSES OF ACTION—JOINDER.**—In an action by minority

CORPORATIONS (Continued).

shareholders against a corporation and its directors the complaint alleged that the defendant corporation was organized solely for the purpose of constructing and maintaining a ditch to divert and carry water from the Salt River; that the shareholders who organized the corporation were at the time of its organization landowners and appropriators of water, and the purpose of the incorporation was to supply such lands with water so appropriated; that their several rights to water were retained by the shareholders, and the only property acquired by the corporation was the dam, canal, and its appurtenances; that the powers of the corporation were limited in the matter of charges to assessments upon the shareholders for the purpose of the maintenance of said canal; that the water appropriated at the time of the organization, six thousand six hundred and seventy inches, was then needed by the shareholders for the proper cultivation of their land, and that they were then entitled thereto; that a majority of the shareholders for four years prior to the filing of the complaint had united in interest, and their acts were adverse to plaintiffs and the others similarly situated; that said majority shareholders elected the directors and officers for the purpose of violating the corporate rights of plaintiffs, by diverting the water appropriated by plaintiffs into other canals for the benefit and in the interests of another canal company in which the majority shareholders and the officers and directors were shareholders; that the majority shareholders were intentionally neglecting and permitting the canal through which plaintiffs obtained their water to become filled up and its carrying capacity to become diminished so that plaintiffs were unable to obtain the water necessary for their lands, and were permitting the water which should have been diverted through said canal to be carried by other canals, for the gain and profit of the majority shareholders; that in furtherance of a plan to control defendant canal company for the benefit of said other corporation, defendants segregated the interests of the shareholders in the waters of Salt River from the land held by said shareholders by creating water-rights, which attempted to limit the right to the use of water, and thereby to diminish the amount to which the shareholders were rightfully entitled; that the majority shareholders caused defendant corporation to charge plaintiffs for the service of water independently of a levy of assessments for the maintenance of the canal; that the majority shareholders had sold a large number of shares to said other corporation, and had segregated the same from the land to which the water was appropriated, and had enabled said corporation to continue to control defendant corporation, for the pecuniary profit and advantage of the majority shareholders alone; that the defendant corporation had, with other canal companies, constructed another canal out of moneys assessed upon shares of plaintiffs, and had subscribed to the stock of said canal and held and voted the same;

CORPORATIONS (Continued).

that defendants, in fraud of the rights of the plaintiffs, during the pendency of a certain suit to which the defendant corporation was a party, had entered into a secret agreement with other parties to said action whereby defendant company was deprived of the right to divert certain waters to the damage of plaintiffs; that all of said acts were done against the protest of the plaintiffs, and that, although frequently demanded, defendants had denied plaintiffs any relief. The prayer was for an injunction against the continuance of the unlawful acts and for an accounting. *Held*, that as the complaint did not anywhere show that the shareholders had any right to the use of water through the defendant corporation's canal by virtue of their relation as shareholders of the company, the complaint stated two causes of action,—one for violation of the corporate rights of the plaintiffs, and the other for the violation of the personal rights of plaintiffs to the use of water through the canal of defendant company. (*Henshaw v. Salt River etc. Co.*, 151.)

- 5. SAME—SAME—PLEADING—COMPLAINT—CAUSES OF ACTION—JOINER—MULTIFARIOUSNESS.**—A complaint on the part of the minority shareholders in an action where the plaintiffs are the same, the defendants are the same, and the relief sought is equitable in both causes of action, stating a cause of action for relief from corporate wrongs and a cause of action for enforcement of personal rights, is not multifarious, where there is no such inconsistency or repugnancy in the various rights declared on as to cause confusion or embarrassment to the court in administering the relief which the facts might warrant were separate suits brought for the enforcement of the several rights. (*Henshaw v. Salt River etc. Co.*, 151.)

COUNTIES.

- 1. COUNTIES—WARRANTS—PROPERLY EXECUTED PRIMA FACIE CAUSE OF ACTION—IMPEACHMENT—MERE DENIAL OF EXECUTION INSUFFICIENT TO OVERCOME PRESUMPTION OF LEGALITY.**—County warrants, signed by the proper officers, are *prima facie* binding and legal. Such warrants make a *prima facie* cause of action. Impeachment must come from the defendant. A mere denial of their execution unsupported by any evidence is insufficient to overcome the presumption in favor of the legality of their issue. (*Apache County v. Barth*, 13.)
- 2. SAME—SAME—PLEADING—ANSWER—DENIAL OF EXECUTION—VERIFICATION—EFFECT OF—REV. STATS. ARIZ. 1887, PAR. 735, CITED.**—A denial of the execution of county warrants, verified (after plaintiff had made his case and rested) under paragraph 735, *supra*, does not necessitate the plaintiff's establishing by corroborative affirmative evidence the execution and issue of the warrants and the regularity and legality of the actions of the board of supervisors in so doing, but the effect and extent of the verification is to enable

COUNTIES (Continued).

the defendant to disprove by affirmative evidence the execution of the warrants, or the regularity or legality of the proceedings on which their issue was based, and that the *prima facie* case already made before the verification of the answer, by the presentation of the warrants duly executed and in proper form, stands until thus destroyed. (Apache County v. Barth, 13.)

3. SAME—SAME—EVIDENCE—COUNTY RECORD OF ALLOWANCE OF CLAIMS AND WARRANTS ISSUED—ABSENCE OF—INSUFFICIENT TO OVERCOME PRESUMPTION OF VALIDITY OF WARRANTS.—While the presentation of the records of the board of supervisors covering the dates on which the warrants were alleged to have been issued would have affected their validity if such records failed to show the authorization of the issue of the warrants or the allowance of the claims on which the warrants were based; nevertheless, evidence that the records of the county showed that the records of the allowance of claims and issue of warrants in this year 1884, the year of the issue of the warrants sued on, were entirely absent, and that the only record was that commencing in 1885, is insufficient to overcome the *prima facie* case made by the warrants declared upon. (Apache County v. Barth, 13.)
4. SAME—SAME—STATUTE OF LIMITATIONS—WHEN CAUSE OF ACTION ACCRUES—FUNDS AVAILABLE FOR PAYMENT—COMP. LAWS ARIZ. 1877, CHAP. 6, SECS. 9-11, 13, AND CHAP. 2, SEC. 19, AND REV. STATS. ARIZ. 1887, PAR. 2314, CITED AND CONSTRUED.—The Compiled Laws of 1877, under authority of which these warrants were issued, provides (chap. 6, secs. 9-11, 13, *supra*) that the county treasurer shall, if there be money in the treasury, redeem warrants on presentation; if there be no funds, he shall indorse thereon "Not paid for want of funds," and when there are sufficient funds to redeem such warrants he shall give notice that he is ready to redeem, and warrants shall be entitled to preference in payment in the order of presentation. Chapter 2, section 19, of the Compiled Laws of 1877, *supra*, provides that where a judgment be recovered against county officers as such no execution shall issue, but the judgment shall be levied and collected as other county charges and paid by the county treasurer.
Held, that the bar of the statute of limitations (Rev. Stats. Ariz. 1887, par. 2314) against an action on a county warrant does not commence to run until there are sufficient funds in the county treasury to pay such warrants. (Apache County v. Barth, 13.)
5. SAME—SAME—SAME—PLEADING—WARRANTS PAYABLE OUT OF PARTICULAR FUND—WHEN AVAILABLE.—Where county warrants are payable out of a particular fund to be created by the county, it cannot plead the statute of limitations until it shows that that fund has been provided. (Apache County v. Barth, 13.)
6. SAME—SAME—SAME—STATUTE GOVERNING—REV. STATS. ARIZ. 1887, PAR. 415, INAPPLICABLE—PAR. 2314 GOVERNS—PAR. 2066 CITED.—

COUNTIES (Continued).

The six months' limitation provided by paragraph 415, *supra*, for open account before adjustment is inapplicable to a suit on county warrants brought under the provisions of paragraph 2066, *supra*, for the purpose of having the board of supervisors approve the payment or exchange of such warrants from the county redemption fund thus provided. The five years' limitation (par. 2314, *supra*) governs such suit, it being an action on "an instrument in writing." (*Apache County v. Barth*, 13.)

COVENANT TO RENEW. See *Landlord and Tenant*, 1, 2, 3, 4, 5.

CRIMINAL APPEALS. See *Criminal Law*, 4.

CRIMINAL LAW.

1. CRIMINAL LAW—APPEAL AND ERROR—CONFLICTING EVIDENCE—SCOPE OF REVIEW—*TERRITORY V. MIRAMONTEZ*, 4 ARIZ. 179, FOLLOWED.—Where the evidence upon which the verdict of a jury is based is conflicting, this court cannot review its weight. It can look into it only to determine whether the court erred in not directing a verdict for the appellant, or in refusing to grant a new trial when there was no evidence to sustain the verdict. (*Anderson v. Territory*, 185.)
2. SAME—SAME—VERDICT OF JURY—WEIGHT OF EVIDENCE—GROUND FOR NEW TRIAL—RULING DISCRETIONARY—WILL NOT BE REVIEWED WHERE THERE IS ANY EVIDENCE TO SUPPORT VERDICT.—Where the verdict is manifestly against the weight of the evidence, it is a proper ground for a new trial, but the granting or refusing of such motion by the trial court is a matter of discretion that will not be disturbed by this court where any evidence to support the verdict was properly given to the jury. (*Anderson v. Territory*, 185.)
3. SAME—ASSAULT WITH INTENT TO COMMIT MURDER—EVIDENCE—SUFFICIENCY—JURY—PROVINCE OF.—In a prosecution for assault with intent to commit murder, the testimony of the prosecuting witness was that the defendant, without provocation or excuse, fired at him with a six-shooter at a distance of forty-five steps, and other witnesses testified that defendant had said he would shoot the prosecuting witness if he saw him. The defendant testified that he shot at the prosecuting witness with a revolver, but stated that it was after witness fired at him with a shot-gun. A witness, who heard the firing, testified that the first report was a pistol-shot, and the later ones gun-shots. The testimony was certainly sufficient to go to the jury, and, if believed, to support the verdict. The weight of this evidence, and the extent to which it was contradicted or explained away, were questions exclusively for the jury, and will not be reviewed on appeal. (*Anderson v. Territory*, 185.)

CRIMINAL LAW (Continued).

4. CRIMINAL LAW—APPEAL AND ERROR—LAWS 1897, ACT NO. 71, RELATES ONLY TO CIVIL APPEALS—CRIMINAL APPEALS—NECESSITY FOR BILL OF EXCEPTIONS OR STATEMENT OF FACTS—PARKER v. TERRITORY, 5 ARIZ. 283, FOLLOWED.—The statute, *supra*, has relation only to appeals in civil cases. In appeals in criminal cases errors outside of the record proper must be set out in a bill of exceptions or statement of facts, and the assignments of error being such as would have to so appear, we cannot examine into them. (*Meara v. Territory*, 299.)
5. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.—An instruction that a doubt, to authorize an acquittal, must be a reasonable one, and it must arise from a careful and candid investigation of all the evidence in the case, and unless the doubt is a reasonable one and does so arise, it will not be sufficient in law to authorize a verdict of not guilty, while not entirely free from criticism, is sufficient. (*Foster v. Territory*, 240.)
6. SAME—MURDER—TRIAL—INSTRUCTIONS—BURDEN OF PROOF—MITIGATING CIRCUMSTANCES—REV. STATS. ARIZ. 1887, PENAL CODE, PAR. 1655, CITED.—A charge that if the jury find from the evidence that the defendant fired the fatal shot, then the burden of proving the circumstances of mitigation, or that justify or excuse the homicide, devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed amounts to manslaughter, or that the defendant was justifiable or excusable, being an exact rescript of the statute, *supra*, is correct. (*Foster v. Territory*, 240.)
7. SAME—SAME—SAME—SELF-DEFENSE—NO DUTY TO RETREAT.—An instruction upon the question of self-defense, that if the defendant could have withdrawn from the danger it was his duty to retreat, is error, the modern doctrine being, that when a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force; and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable. (*Foster v. Territory*, 240.)
8. SAME—SAME—SAME—SELF-DEFENSE—EVIDENCE—SUFFICIENCY.—Where the defendant testified that he went to the door of his saloon, being drawn there because his brother and the deceased were at the time in the street firing at each other with revolvers, and that while standing there he was fired at by the deceased, and that he thereupon returned the fire and killed the deceased, there is sufficient evidence, however contradicted, to justify the court in submitting the issue of self-defense to the jury. (*Foster v. Territory*, 240.)
9. SAME—SAME—SAME—INSTRUCTIONS—EVIDENCE.—Instructions should not ignore any finding of fact which the jury might reasonably make upon the evidence before them. (*Foster v. Territory*, 240.)

CRIMINAL LAW (Continued).

10. **CRIMINAL LAW—LARCENY OF CALF—FELONIOUS INTENT—EVIDENCE—SUFFICIENCY.**—Where the evidence showed that a stray cow and calf, both of the same color, the calf unmarked, the cow branded "B," which defendant knew to be the brand of the prosecuting witness, had ranged in the vicinity of defendant's corral for some time; that on the day the larceny was committed the defendant and his employee roped and took the calf into the corral and left it there, without branding, with other cattle; that the Blair cow followed it to the corral, and the next morning bellowed till the defendant's brother and the employee turned the calf out, when it went off with the cow to the owner; that defendant testified that he did not know whose calf it was and did not look for its mother, and therefore did not brand it; that others testified the cow and calf had been around there for six or seven months, and that the cow was looking on when defendant took the calf away, it is sufficient to justify the jury in inferring a felonious intent in the taking of the calf, and a verdict of guilty will not be disturbed. (Dickson v. Territory, 199.)

CROSS-COMPLAINT. See Mines and Mining, 24; Pleadings, 1.

CUMULATIVE REMEDIES. See Office and Officers, 6.

DAMAGES. See Claim and Delivery, 7; Master and Servant, 4.

DECEIT. See Equity, 10.

DECREE. See Irrigation, 1; Marriage and Divorce, 1, 2, 3, 4, 5, 6.

DEFENSE. See Equity, 3, 4, 5, 6; Landlord and Tenant, 12, 13; Marriage and Divorce, 3; Pleadings, 2, 3, 16.

DELAY.

Not necessarily acquiescence. See Equity, 3.

DEMAND.

To fund county indebtedness, sufficient if made by holders of evidence thereof. See Bond, 2.

DEMURRER.

To answer, motion for judgment on pleadings, equivalent to. See Judgment on Pleadings, 2.

See Pleadings, 17.

DILIGENCE.

Due. See Contracts, 3; Landlord and Tenant, 1; New Trial, 1.

DISMISSAL.

Failure to file bond, cause for. See Appeal and Error, 16.

DISSOLUTION.

Of injunction. See Injunction, 1, 2, 4.

DOUBLE TAXATION. See Taxes and Taxation, 6, 9.

DUE-BILL.

When operative as assignment of claims for which given. See Account, 1.

EJECTMENT.**1. EJECTMENT—ANSWER—ADVERSE POSSESSION—ISSUES—TENANCY—**

EVIDENCE.—Where the answer to a complaint in an action in the nature of ejectment is a plea of adverse possession, through title in defendant, adverse to plaintiff, it is error for the court to instruct the jury to bring in a verdict for defendant upon the ground that under the evidence it was apparent that at the time the action was brought defendant was a tenant of plaintiff, the issue not being between landlord and tenant, and the only evidence of tenancy being the testimony of plaintiff that at one time defendant was his tenant, but that he had never received any rent and had not asked for any rent for more than two years. (Steinfeld v. Ross, 91.)

2. SAME—OUSTER—EVIDENCE—DEFENDANT'S TITLE DEEDS—STATUTE OF LIMITATIONS—WHEN ADVERSE HOLDING COMMENCED.—Plaintiff in ejectment has a right to show the nature and time of the ouster by introducing the deeds under which defendant claims. Though the deed as dated might have been a bar to the action of plaintiff because of the statute of limitations, the date is not conclusive; the plaintiff having the right in connection therewith to have shown that he never knew of an adverse claim, and that none had been asserted until within a period not affected by the statute. (Steinfeld v. Ross, 91.)**ELECTIONS.****1. ELECTIONS—QUALIFICATION OF VOTER—REV. STATS. U. S. 1878, SEC. 1860 (ORGANIC ACT), CONSTRUED—POWER OF LEGISLATURE—WOMAN'S SUFFRAGE.**—Subject to the restrictions of section 1860, *supra*, that the right to vote should be limited to citizens of the United States, or to those who have declared their intention to become such, above the age of twenty-one years, the legislature of this territory has the power to confer the elective franchise upon females. (Cronly v. City of Tucson, 235.)**2. SAME—SAME—LAWS ARIZ. 1897, ACT NO. 76, SEC. 2, VOID AS IN CONFLICT WITH REV. STATS. U. S. 1878, SEC. 1860 (ORGANIC ACT).**—The statute, *supra*, by its terms conferring the right to vote

ELECTIONS (Continued).

at municipal elections upon all taxpayers, male and female, without regard to age or citizenship, is in conflict with section 1860, *supra*, and is void. (Cronly v. City of Tucson, 235.)

3. **SAME—SAME—SAME—VOID FOR AMBIGUITY AND UNCERTAINTY.**—The statute, *supra*, providing that "every taxpayer shall be entitled to vote" at any city election, may mean every resident taxpayer, or every taxpayer without regard to residence within the city; again, the language used may convey the meaning that the taxpayer must be one paying taxes within the city, or it may be read to include a taxpayer whose taxable property is without the limits of the city; and such is the uncertainty and ambiguity in the language used that it is void. (Cronly v. City of Tucson, 235.)

See Statutory Construction, 2.

ENTRY.

Nunc pro tunc. See Appeal and Error, 9.

EQUITY.

1. **EQUITY—CONTRACT OF SALE—FORFEITURE—EXTENSION OF TIME FOR PERFORMANCE OF CONDITIONS OF SALE.**—Under the evidence, plaintiff will be given ninety days in which to pay the balance of the purchase price after he is placed in possession and an accounting is had, and, if he elects so to do, defendant shall convey the property to him; in case the balance is not so paid, then a master shall sell the property as provided by law for the sale of real property under execution, and shall out of the proceeds pay to the defendant the balance due upon the purchase price of said mine and the balance to the plaintiff. (Henry v. Mayer, 103.)
2. **EQUITY—RELIEF AGAINST MISTAKES OF LAW—COMPROMISES.**—Equity often relieves against mistakes of law, but under such circumstances that the mistake may be treated as one of fact. But where one, with full knowledge of the material facts, compromises her claims against another and obtains a decree which accomplishes the ends she wishes to effect, she will not be heard to complain that she was mistaken as to the legal effect thereof as to its binding force. (Hereu v. Hereu, 270.)
3. **SAME—DEFENSES—DELAY.**—Delay in pursuing a remedy is not acquiescence; yet mere delay may of itself be a reason for courts of equity to refuse to act, and they generally do refuse where other parties have contracted new engagements as the result of delay. (Hereu v. Hereu, 270.)
4. **SAME—SAME—ACQUIESCENCE DEFINED.**—Acquiescence is mere silence—refusal to speak when one ought to speak for the protection of others, or to act in time to prevent others from doing acts of which the dilatory one afterwards complains. (Hereu v. Hereu, 270.)

EQUITY (Continued).

5. **SAME—SAME—CONFIRMATION DEFINED.**—Confirmation is a deliberate act—a ratification of a previous transaction known to be avoidable. (*Hereu v. Hereu*, 270.)
6. **SAME—SAME—LACHES—ACQUIESCENCE—CONFIRMATION—MARRIAGE AND DIVORCE—VACATING DECREE.**—Where defendant consented to the modification of a voidable decree of divorce by which she received one half of the community property, she is estopped by confirmation, also by acquiescence and laches in delaying fifteen years to have the judgment set aside, until in the mean time plaintiff had remarried and a new family had grown up under his protection. (*Hereu v. Hereu*, 270.)
7. **EQUITY—TRIAL—JURY—GRANTING OF REQUEST FOR—ISSUES OF FACT TO BE SUBMITTED—DISCRETIONARY.**—In a cause of equitable jurisdiction it is wholly within the discretion of the court whether or not a request for a jury shall be granted, and if a jury be called, as to what issues of fact shall be submitted to it. (*Henry v. Mayer*, 103.)
8. **SAME—SAME—SAME—VERDICT—FINDINGS—DISREGARDING—NO NECESSITY FOR FORMALLY SETTING ASIDE.**—In a suit involving equitable jurisdiction only the trial court is at liberty to disregard the verdict and findings of the jury and make its own findings and enter a decree in accordance with the latter, and this without formally setting aside the verdict and findings of the jury before entering the decree. (*Henry v. Mayer*, 103.)
9. **SAME—SAME—SAME—SAME—ADOPTION BY COURT—APPEAL AND ERROR—REVIEW—TO BE REGARDED AS FINDINGS OF COURT.**—The adoption by the court in its decree in an equity case of the findings of the jury was discretionary with the court and must be regarded simply as the findings of the court, and not of the jury, in so far as they may be reviewed on appeal. (*Henry v. Mayer*, 103.)
10. **SAME—GROUND OF RELIEF—FOLLY—FRAUD—MISREPRESENTATION AND DECEIT.**—Where it is evident that the party seeking relief has gotten the worst of the bargain, if this be due to his own folly and shortsightedness, and not to any willful misconduct on the part of the defendant or his agents, equity can afford him no relief not within the strict letter of his contract. But if, on the contrary, he be the victim of misrepresentation, fraud, and deceit practiced by and directly traceable to defendant, or indirectly through any of defendant's agents, then equity can and should afford him relief at the expense of defendant. (*Henry v. Mayer*, 103.)
11. **SAME—APPEAL AND ERROR—REVIEW—FINDINGS—ONLY HELD ERRONEOUS FOR FORCIBLE REASONS—DEPENDENT ON CREDIBILITY OF WITNESSES—ON DEDUCTION FROM UNDISPUTED FACTS.**—The findings of the trial court should be given great weight, and be deemed conclusive, on controverted questions of fact in equity as in actions at law, unless there be forcible reasons to warrant the inference that

EQUITY (Continued).

they are erroneous. Particularly so when the findings depend upon the credibility of witnesses, and not merely upon deductions from facts concerning which there is little dispute. (*Henry v. Mayer*, 103.)

12. **SAME—SAME—SAME—FRAUD—EVIDENCE—MATTER OF DEDUCTION FROM ACTS—CAREFULLY REVIEWED—SUFFICIENCY TO SUSTAIN FINDINGS AND DECREE.**—Where the gravamen of the complaint is fraud, it being rarely open, visible, or susceptible of direct and positive proof, and most usually a matter of inference to be drawn from the actions and conduct of men who at the time are careful to cover up their purposes and intent to deceive, so as to avoid detection and enjoy in safety the fruit of their wrong-doing, this court will carefully review the evidence to see whether it supports the findings and decree. (*Henry v. Mayer*, 103.)

13. **EQUITY—TRIAL—JURY—SPECIAL VERDICT—ADVISORY—REV. STATS. ARIZ. 1887, PAR. 786, CONSTRUED.**—Paragraph 786, *supra*, providing that a special verdict shall, as between the parties, be conclusive as to the facts found, does not modify the rule in equity trials that where a court submits certain questions to the jury the answers are advisory only, and may be disregarded by the court. (*Egan v. Estrada*, 248.)

See Marriage and Divorce, 6; Mines and Mining, 19; Taxes and Taxation, 10; Vendor and Vendee, 1.

ESTOPPEL. See Claim and Delivery, 5; Negotiable Instruments, 1.

EVIDENCE.

1. **EVIDENCE—MAPS—ILLUSTRATIONS OF TESTIMONY—SUBSTANTIVE EVIDENCE.**—A map prepared by an engineer who was upon the ground and took the bearings and distances of certain monuments in relation to each other and to other objects, as they were pointed out to him by the locator, from his field-notes, unless it is to be used in evidence as a substantive and independent piece of evidence, need not be proved to be correct before admission in evidence; and where the map is proven to be a correct representation of the lines connecting the objects pointed out to the engineer, it is not necessary that it should be able to stand the tests as to whether the monuments represented were the correct monuments, it being used in connection with the testimony of witnesses to show that which they were endeavoring by words to explain. (*Jordan v. Duke*, 55.)
2. **EVIDENCE—NEGOTIABLE INSTRUMENT—MUTUAL ACCOUNTS—SETTLEMENT—GIVING NOTE PRIMA FACIE EVIDENCE ONLY.**—The giving of a note where there are mutual accounts between the maker and payee is not conclusive evidence that the maker was actually indebted to the payee in the amount mentioned therein, as a

EVIDENCE (Continued).

result of a complete and full settlement of mutual accounts, but only raises a presumption of this fact, which may be overturned by competent evidence. (Walker v. Gray, 359.)

See Appeal and Error, 7, 22, 24, 28, 29; Claim and Delivery, 2, 4, 5; Criminal Law, 1, 2, 3, 8, 9, 10; Ejectment, 1, 2; Equity, 12; Fraudulent Conveyances, 3; Husband and Wife, 1; Irrigation, 8; Landlord and Tenant, 2, 6, 7, 8, 9; Mines and Mining, 1, 2, 3, 4, 12, 14, 15, 17, 20, 21, 22, 24; Pleadings, 6; Principal and Agent, 1; Taxes and Taxation, 3, 14.

EXECUTION.

May be levied on property without bringing action to cancel fraudulent conveyance. See Fraudulent Conveyances, 2.

FEES. See Interest, 1.

FINAL JUDGMENT.

What is not. See Appeal and Error, 2.

FINDINGS. Disregarding in equity case. See Equity, 8.

Sufficiency of. See Appeal and Error, 32; Claim and Delivery, 3.

See Equity, 11, 12; Husband and Wife, 1; Irrigation, 2; Landlord and Tenant, 2.

FORECLOSURE. See Mortgages, 1, 2, 3, 4, 5, 6, 7; Pleadings, 3; Writ of Assistance, 1.

FORFEITURE. See Equity, 1; Mines and Mining, 6, 9, 10, 11, 12, 19; Vendor and Vendee, 1.

FORGERY. See Negotiable Instruments, 1.

FORMAL DEFECTS.

Objection to where first raised on appeal will be disregarded if complaint states facts sufficient to give jurisdiction. See Appeal and Error, 5.

FRAUD. See Equity, 10, 12; Mines and Mining, 17; Mortgages, 3.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES—ACTION BY JUDGMENT CREDITOR TO SET ASIDE—PLEADING—SUFFICIENCY.**—In an action by a judgment creditor to cancel a conveyance by his debtor, an allegation that the conveyance was made for the purpose of hindering and delaying the plaintiff in the collection of the debt upon which the said judgment was rendered, and was without consideration, fraudulent, and void

FRAUDULENT CONVEYANCES (Continued).

as to this plaintiff, is sufficient to sustain a judgment in the absence of a demurrer. (*Rountree v. Marshall*, 413.)

2. **SAME—EXECUTION—MAY BE LEVIED ON PROPERTY WITHOUT BRINGING ACTION TO CANCEL FRAUDULENT CONVEYANCE—REV. STATS. ARIZ. 1887, SEC. 2031, CONSTRUED.**—Under the statute, *supra*, an attempted transfer by a fraudulent grantor is ineffectual to divest him of the legal title, and a creditor may levy upon and sell the property as if no conveyance had ever been made by the debtor. (*Rountree v. Marshall*, 413.)

3. **SAME—EVIDENCE—SUFFICIENCY—FRAUDULENT INTENT OF VENDOR—VENDEE'S KNOWLEDGE OF INTENT.**—Where the evidence establishes the fraudulent intent of the debtor in making the conveyance, and the full knowledge of the vendee of such intent, a judgment canceling the conveyance will not be set aside. (*Rountree v. Marshall*, 413.)

See Homestead, 2.

FRAUDULENT REPRESENTATIONS. See Mines and Mining, 18, 19.

FUNDAMENTAL ERROR. See Appeal and Error, 4.

FUNDING.

Who may demand. See Loan Commissioners, 1.

GENERAL DENIAL. See Mines and Mining, 24.

GOOD FAITH. See Landlord and Tenant, 1.

GUESTS. See Innkeepers, 1.

HARMLESS ERROR. See Appeal and Error, 9; Mines and Mining, 4.

HOMESTEAD.

1. **HOMESTEAD—CONVEYANCE—BY HUSBAND TO WIFE—COMP. LAWS ARIZ. 1877, PAR. 2141, CONSTRUED.**—Paragraph 2141, *supra*, providing that no alienation of a homestead by a married man shall be valid without the signature of the wife, acknowledged by her separately and apart from her husband, has no application to a conveyance of a homestead by a husband to his wife. (*Luhrs v. Hancock*, 340.)

2. **HOMESTEAD—FRAUDULENT CONVEYANCES—CONVEYANCE OF HOMESTEAD CANNOT BE ATTACKED AS FRAUDULENT—COMP. LAWS ARIZ. 1877, PAR. 2140, CITED.**—The conveyance of a homestead, it being free from any claims of creditors, cannot be questioned by them as fraudulent. (*Luhrs v. Hancock*, 340.)

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—LIABILITY FOR HUSBAND'S DEBTS—EVIDENCE—APPEAL AND ERROR—FINDING ON CONTROVERTED FACTS SUSTAINED—ANDERSON V. TERRITORY, ANTE, P. 185, CITED.**—W. H. Hatcher, the husband of defendant, having broken his leg, wrote a letter to a merchant at Prescott, advising him to send Mrs. Hatcher and a surgeon. The merchant informed Mrs. Hatcher and asked her what doctor he should send. She told him that plaintiff always attended Mr. Hatcher. The merchant notified plaintiff by messenger and personally, and hired a team for him. The plaintiff, learning that Mrs. Hatcher desired to go with him, drove to her house and took her with him. He testified that Mrs. Hatcher told him that she would see him paid. After Mr. Hatcher's recovery, the plaintiff presented two bills and wrote a couple of letters to Mr. Hatcher, and afterwards made out an account against defendant, which his attorney mailed to her and afterwards brought suit upon. Defendant testified in direct contradiction to plaintiff in regard to his employment by her, and stated that she did not employ him herself nor agree to pay him out of her separate estate. *Held*, that the evidence brings the case within the rule that a "finding of the lower court upon a controverted fact will not be disturbed by this court on appeal, unless such finding is clearly against the weight of the evidence," and therefore a judgment upon a finding for defendant will be affirmed. (*Sewall v. Hatcher*, 319.)

IMPEACHMENT.

Of county warrant must come from defendant. See Counties, 1.

INJUNCTION.

1. **INJUNCTION—DISSOLUTION—COMING IN OF SWORN ANSWER.**—It is a general rule of equity practice that upon the coming in of an answer denying the equities of a bill, the defendant is entitled to have the injunction dissolved. (*Hampson v. Adams*, 335.)
2. **SAME—SAME—ANSWER—TAKEN AS TRUE.**—Where a motion to dissolve is heard upon the bill and answer, the responsive allegations of the latter must be taken to be true; and if the equity of the bill is sworn away the injunction may be dissolved. (*Hampson v. Adams*, 335.)
3. **SAME—PLEADING—ANSWER—NOT A GENERAL DENIAL.**—A complaint in a suit to enjoin the collection of taxes alleged that the cattle upon which the taxes were levied were ranging over a mountainous country, that it was practically impossible to count them, but that the ten thousand head returned to the assessor was a fair and just estimate of the number owned by plaintiff, and the board of equalization arbitrarily, and for the purpose of revenge, increased the number upon the assessment-roll. The answer denied that it was impossible to count the cattle, or that ten thousand head was a fair and just estimate of the number thereof, or that said number

INJUNCTION (Continued).

was all the cattle owned by plaintiff, and specifically denied the other allegations of the complaint. *Held*, that the answer is not a general denial, and therefore the doctrine that a general denial is not good in chancery is inapplicable. (*Hampson v. Adams*, 335.)

4. **SAME—DISSOLUTION—ANSWER—DISCRETIONARY—APPEAL AND ERROR—REVIEW.**—If the dissolution of a preliminary injunction upon the coming in of a sworn answer denying the equities of the bill is not the plain duty of a court, it is an exercise of judicial discretion with which an appellate court will not interfere. (*Hampson v. Adams*, 335.)
5. **SAME—PLEADINGS—BURDEN OF PROOF—FAILURE TO OFFER EVIDENCE—RIGHT TO INJUNCTION.**—Where in a suit for an injunction the case is submitted on the pleadings, without evidence, and the answer is responsive to and expressly denies the material averments of the complaint, the burden of proof being on the plaintiff, and he having failed to support by proof the allegations of his complaint, the court properly refused to grant a perpetual injunction. (*Hampson v. Adams*, 335.)

See Irrigation, 5, 6, 7, 8; Taxes and Taxation, 10.

INNKEEPERS.

1. **INNKEEPERS—GUESTS—BOARDERS—LIABILITY DIFFERENT TO EACH.** The strict liability of innkeepers exists only in favor of guests, and not in favor of boarders. As to guests, the liability of an innkeeper approximates that of an insurer; but for the goods of those who reside at the inn as boarders, rather than as guests, the innkeeper is liable only as any ordinary bailee for hire, and as such is only bound to use ordinary diligence. (*Haff v. Adams*, 395.)
2. **SAME—EVIDENCE REVIEWED AND PLAINTIFF HELD A BOARDER—NEGLECT—FAILURE TO PROVE.**—In an action against a hotel proprietor for loss of jewelry from her rooms plaintiff testified that she had sold out her business in Kentucky, and had rented her home there, and had come to Phoenix to start her adopted son in business, and that she had made a bargain before she moved that she would pay one hundred and thirty-five dollars per month for certain rooms, board, and service, and that she selected the rooms and the furniture for the same, and that she had lived at the hotel six months, and had no other home. There was no evidence of any negligence on the part of defendant. *Held*, that plaintiff was a boarder, and was not entitled to recover in the absence of proof of negligence on the part of the defendant. (*Haff v. Adams*, 395.)

INNOCENT PURCHASERS. See Sureties, 1.

INSTRUCTIONS. See Appeal and Error, 27; Criminal Law, 5, 6, 7, 9; Irrigation, 4; Landlord and Tenant, 10; Mines and Mining, 24; Practice, 1.

INTENT. See Criminal Law, 10; Fraudulent Conveyances, 3.

INTEREST.

1. **INTEREST—NOTE—ATTORNEY'S FEES—BEAR INTEREST AT LEGAL RATE.**—It is error to render judgment upon a note bearing interest and providing an attorney fee in event of suit, for the amount of the note and attorney fee with interest upon the whole at the rate mentioned in the note. The attorney fee should bear interest at the legal rate. (*McClintock v. Bolton*, 370.)
2. **SAME—JUDGMENT—ACTION ON—CONFORMITY TO FORMER JUDGMENT—INTEREST—LEGAL RATE.**—A judgment in an action upon a judgment should correspond therewith as to the interest upon the principal sum, but the interest upon the interest accrued under the former judgment should be computed at the legal rate. (*McClintock v. Bolton*, 370.)

INTERLOCUTORY ORDERS. See Res Adjudicata, 1.

INTERVENTION. See Appeal and Error, 11.

IRRIGATION.

1. **IRRIGATION—APPROPRIATION—ACTIONS—PRIORITIES—DECREE—PRORATING.**—In an action to determine relative rights to the use of water from a common source for irrigation, where the decree specifies the several rights, and that one right is prior to another, it is error for the court to decree that in seasons of scarcity the water shall be prorated. (*Huning v. Porter*, 171.)
2. **SAME—SAME—SAME—SAME—FINDINGS—SUFFICIENCY OF WATER FOR ALL—IMMATERIAL.**—A finding in an action to determine relative rights to the use of water that up to the time of the filing of the complaint there had been sufficient water at all times in the common source for plaintiff and defendant is immaterial, as that fact furnishes no assurance that there will continue to be such sufficiency; and when the relative priorities in which the rights exist are determined, it is immaterial whether or not the stream furnishes a sufficiency for all. (*Huning v. Porter*, 171.)
3. **IRRIGATION—APPROPRIATION—ADVERSE USER—STATUTE OF LIMITATIONS—CANNOT START TO RUN WHILE WATER SUFFICIENT FOR ALL—WHAT CONSTITUTES ADVERSE USER—WHEN STATUTE COMMENCES TO RUN—TO WHAT WATER THE USE IS ADVERSE—SUBSEQUENT APPROPRIATOR CAN USE UNDER HIS APPROPRIATION WITHOUT USE BEING ADVERSE.**—When there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water to start the statute of limitations running. Each is entitled to the use, and it is only when the water becomes so scarce that all of the parties cannot be supplied, and that one appropriator takes water which by priority belongs to another appropriator, that there is an

IRRIGATION (Continued).

adverse use. The statute commences to run from the time when such adverse use is made of the water, the adverse use being only of that water which the prior party is entitled to. When there is a sufficiency of water in the river, the prior appropriator is not entitled to the water used by the subsequent appropriator, and the subsequent appropriator can use under his appropriation without being an adverse user. (*Egan v. Estrada*, 248.)

4. **SAME—SAME—SAME—JURY—INSTRUCTIONS — FAILURE TO DEFINE ADVERSE USE OF WATER—MISLEADING JURY TO BELIEF THAT PEACEABLE POSSESSION OF DITCH FOR FIVE YEARS GAVE RIGHT TO WATER.**—An instruction that "If you find that the defendant was for any five consecutive years after he built his ditch, . . . and before the commencement of this action, in the peaceable and adverse possession of his ditch," and of the water diverted thereby from the river, "and did for any such period of five years use such water in irrigating . . . his land, then you are instructed that such adverse use, for such period, gave him a good and valid right to said water against the plaintiffs, and made his right to use such water a prior right to any right that plaintiffs may have," is erroneous. It does not define adverse use of water, and has the tendency to lead the jury to the conclusion that if the defendant had been in peaceable possession of his ditch for five years such possession would give him a prior right. (*Egan v. Estrada*, 248.)
5. **IRRIGATION—CONTRACTS—INJUNCTION—RIGHT TO—DEPENDENT UPON AGREEMENT.**—Where plaintiff canal company has entered upon and enlarged the canal of defendant company under a written contract, such contract determines the right of plaintiff to enjoin defendant from doing any act in control of its property and conduct of its business. (*Consolidated Canal Co. v. Mesa Canal Co.*, 135.)
6. **SAME—SAME—SAME—USE OF IRRIGATION WATER FOR POWER PURPOSES—DESTRUCTION OF WATER-POWER.**—Where plaintiff canal company has entered upon the canal of defendant and enlarged and raised the grade of the same above the division-gates, under an agreement that before plaintiff "is entitled to receive or use any water through the canal, it shall first deliver at the division-gates seven thousand inches of water to defendant," and the agreement is silent as to the elevation at which water should be delivered, plaintiff is not entitled to an injunction restraining defendant from placing a dam, at its own expense, below the division-gates, sufficiently high to raise the water so as to irrigate lands under defendant's canal that could not have been formerly irrigated at the original elevation, though such dam destroyed a water-power developed by the drop at the division-gates and used for years by plaintiff, it appearing from the evidence that such water-power was so generated by the seven thousand inches the use of which is denied to plaintiff in its contract with defendant. (*Consolidated Canal Co. v. Mesa Canal Co.*, 135.)

IRRIGATION (Continued).

7. **SAME—SAME—SAME—SAME—DIMINISHING CARRYING CAPACITY.**—A slight difference in the carrying capacity of plaintiff's canal is insufficient ground to warrant such injunction where it appears that the height of the water as raised by the dam does not exceed the level at which it had been carried by the plaintiff to the point of delivery. (*Consolidated Canal Co. v. Mesa Canal Co.*, 135.)
8. **IRRIGATION—INJUNCTION—INTERFERENCE WITH DITCH—EVIDENCE—PRIOR APPROPRIATION.**—In an action to restrain defendant from interfering with an irrigating ditch, it is error to exclude evidence offered by defendant that, by means of artificial channels, and partly by using natural channels, he had used the water which plaintiff had testified plaintiff had used for five years for eighteen years prior to the commencement of the action for irrigating the lands owned by him. (*Kleyenstuber v. Robinson*, 31.)

See Appeal and Error, 19; Corporations, 4; Landlord and Tenant, 13.

ISSUES. See Ejectment, 1; Mines and Mining, 24.

JAILER.

Salary. See Office and Officers, 3.

JOINDER.

Of causes of action. See Corporations, 4, 5; Pleadings, 7.
See Pleadings, 10.

JOINT LOCATORS. See Mines and Mining, 16.

JUDGMENTS.

1. **JUDGMENTS—DIFFERENT CAUSE OF ACTION—CONCLUSIVENESS.**—A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties, or their privies, though the second suit be for a different cause of action, so long as the judgment in the first suit remains unmodified. (*Stevens v. Wadleigh*, 351.)

See Appeal and Error, 1, 2, 9, 12, 15, 16, 18; Attachment, 1;
Claim and Delivery, 2; Interest, 2; Mortgages, 1, 5.

JUDGMENT ON PLEADINGS.

1. **JUDGMENT ON PLEADINGS—STATUTE OF LIMITATIONS—SUFFICIENCY OF ANSWER—REV. STATS. ARIZ. 1887, PARS. 2311, 2312, CITED AND CONSTRUED.**—Paragraph 2311, *supra*, provides that actions upon open accounts shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterwards; and paragraph 2312, *supra*, provides that the limitation shall run

JUDGMENT ON PLEADINGS (Continued).

against each item from the date of delivery, unless otherwise specifically directed. Where the complaint in an action upon an open account contains an itemized statement showing the dates of delivery of the several items, and the answer alleges the entire account, including the very last item charged to be beyond the prescribed limitation of time, and sets up the bar of the statute, it is error to render judgment for the plaintiff on the pleadings. (*Wagner v. Boyce*, 71.)

2. **JUDGMENT ON PLEADINGS, WHEN PROPER—MOTION FOR EQUIVALENT TO DEMURRER TO THE ANSWER.**—When any defense has been pleaded, unless the pleadings show a clear right for recovery on the part of the plaintiff, after giving due weight to the defense presented in the answer, the plaintiff is not entitled to judgment on the pleadings; and in that sense a motion for judgment on the pleadings is equivalent to a demurrer to the answer. (*Wagner v. Boyce*, 71.)

See Pleadings, 5.

JUNIOR MORTGAGOR. See Mortgages, 6.

JURISDICTION. See Appeal and Error, 14, 21.

JURY.

Province of. See Criminal Law, 3.

See Appeal and Error, 25; Common-Law Action, 1; Constitutional Law, 1; Equity, 7, 8, 9, 13; Irrigation, 4; Landlord and Tenant, 10; Practice, 1.

JURY TRIAL.

Right to. See Common Law Action, 1.

KNOWLEDGE. See Mortgages, 7.

LACHES. See Equity, 6; Tenancy in Common, 3.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—COVENANT TO RENEW—FAILURE TO GIVE NOTICE—WANT OF GOOD FAITH—DILIGENCE.**—Want of good faith or diligence can not be predicated upon the fact that the lessee did not give notice of his intention to renew a lease prior to an accident which prevented the giving of notice until after the time limited in the lease had expired, where it appears that the lessor lived in the same town as the lessee and two days remained within which to serve the notice at the time the accident occurred. (*Monihon v. Wakelin*, 225.)

2. **LANDLORD AND TENANT—COVENANT TO RENEW—SPECIFIC PERFORMANCE—APPEAL AND ERROR—FINDINGS—SUFFICIENCY OF EVIDENCE.**

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LANDLORD AND TENANT (Continued).

—In an action for specific performance of a covenant to renew a lease, a finding that the lessor had made no contract for the letting of the premises to any other person, and was in the same position respecting said premises and the leasing thereof as on the day the option to renew expired, is sustained by evidence that while it was probable the lessor could have rented to a third party at an enhanced figure, yet he had not entered into any binding agreement so to do. (*Monihon v. Wakelin*, 225.)

3. **SAME—SAME—SAME—FAILURE TO GIVE NOTICE—UNAVOIDABLE ACCIDENT WITHOUT INJURY TO LESSOR.**—A court of equity will decree specific performance of renewal in a lease, where the lessee, by reason of unavoidable accident, causing disability, failed to give notice of his intention to renew within the time specified in the lease for the giving of such notice, he having actually given such notice at the first opportunity, and where it appears that the lessor, by reason of the delay in giving notice, is not put in a worse position than he would have been had notice been given. (*Monihon v. Wakelin*, 225.)
4. **SAME—SAME—CONSIDERATION—SUBSTANTIAL PART OF CONTRACT.**—A covenant to renew a lease is more than a naked option or a unilateral agreement, and, unless it is otherwise declared in the instrument itself, constitutes a substantial part of the whole contract, because it may well be considered as a material inducement which led to its execution. (*Monihon v. Wakelin*, 225.)
5. **SAME—SAME—TIME THE ESSENCE OF.**—Time is of the essence of covenants of renewal in written leases, where the giving of notice of intention within a specified time is made condition precedent to such renewal. (*Monihon v. Wakelin*, 225.)
6. **LANDLORD AND TENANT—LEASE—ACTION FOR RENT—EVIDENCE—RESCISSION OF LEASE AT DATE LATER THAN TIME FOR WHICH RENT IS SOUGHT—IMMATERIAL.**—Evidence tending to show a rescission of a lease at a date later than the month for which recovery of rent is sought is immaterial. (*Kastner v. Campbell*, 145.)
7. **SAME—SAME—SAME—SAME—LESSEE'S ACTS TOWARD SURRENDER OF ESTATE PROPERLY EXCLUDED IN ABSENCE OF AVOWAL OF INTENTION TO PROVE LANDLORD'S ACQUIESCENCE THEREIN.**—An offer of proof of the service of notice by the lessee of his intention to leave the leased premises, and also of other acts, solely upon his part, showing what he alone did towards surrendering the lease, is properly refused, upon objection, there being no avowal that these acts would be connected with any acceptance on the part of the lessor. (*Kastner v. Campbell*, 145.)
8. **SAME—SAME—SURRENDER—AGREEMENT—ACTS EVIDENCING AGREEMENT.**—The surrender of a lease is the yielding up of the estate to the landlord so that the leasehold interest becomes extinct by mutual agreement between the parties. It is either in express words

LANDLORD AND TENANT (Continued).

or by operation of law, through some act which implies that they have both agreed to consider the surrender as made. (*Kastner v. Campbell*, 145.)

9. **SAME—SAME—SAME—EVIDENCE—ADMISSIBILITY.**—In an action for rent due upon a lease where the defense is surrender of the lease, evidence of a dissolution of partnership between the lessees and the removal of one with the knowledge of the lessor prior to the default in the rent and of a controversy between the lessor and the remaining partner about the rent, and of said partner's desire to pay the rent and remove to a building he had been forced to construct, and of the lessor's refusal to permit such removal, is inadmissible to prove surrender of the lease. (*Kastner v. Campbell*, 145.)
10. **SAME—SAME—SAME—JURY—INSTRUCTIONS—ONLY SUCH AS ARE PERTINENT TO THE EVIDENCE.**—It is the duty of the court in charging the jury to give only such instructions as are pertinent to the evidence. (*Kastner v. Campbell*, 145.)
11. **SAME—TENANCY AT WILL—WHAT CONSTITUTES—TERMINATION.**—If the lessee is occupying premises under a verbal agreement with the owner that he should pay therefor one hundred dollars per month, which agreement is to continue for no definite length of time, such lessee is a tenant at will, and can terminate the lease whenever he chooses by giving to the owner reasonable notice of such intention and paying all rent due to date of said termination. (*Kastner v. Campbell*, 145.)
12. **SAME—LEASE—SURRENDER—DEFENSE—BURDEN OF PROOF.**—The burden of proving the surrender of a written lease rests upon the defendant alleging such surrender. (*Kastner v. Campbell*, 145.)
13. **LANDLORD AND TENANT—LEASE—IRRIGATION—FAILURE TO DELIVER WATER—DEFENSE.**—An answer, in an action for rent, based upon a lease of land and water-rights, with covenants for peaceable possession, setting up that the right to the use of water was a material part of the lease, and that plaintiff had failed and refused to deliver the water, is insufficient, without an allegation that the lessor agreed or bound himself to deliver the water, or that he failed in his title to the water, or to defend the lessee in the right, under the agreement, to the use of water for irrigation purposes. (*Stevens v. Wadleigh*, 351.)

LARCENY.

Of calf. See Criminal Law, 10.

LAW OF CASE.

Res Adjudicata. See Appeal and Error, 8, 34.

LEASE. See Landlord and Tenant, 6, 7, 8, 9, 10, 12, 13.

LEVY. See Attachment, 2, 3.

LIVE-STOCK SANITARY BOARD.

1. LIVE-STOCK SANITARY BOARD—CERTIFICATE OF RECORDING BRAND—DATE OF RECORDING—SUFFICIENCY—LAWS ARIZ. 1897, ACT No. 6, SECS. 49, 50, CONSTRUED.—A certificate of a cattle-brand issued by the live-stock sanitary board, under the provisions of section 49, *supra*, making it *prima facie* evidence of ownership of cattle bearing such brand in prosecutions under the statute, or under the laws of the territory in regard to the unlawful disposition of animals of the bovine kind, complies with the requirements of section 50, *supra*, and authenticates the date of the recording of the brand; where it recites "that the same has been recorded at 4:30 P. M. o'clock on the day, month and year below written, to wit: [designated brand for cattle]. Given under my hand and seal this 29th day of April, 1897." (Dickson v. Territory, 199.)

LOAN COMMISSION.

1. LOAN COMMISSION—MANDAMUS—TO COMPEL CITY AUTHORITIES TO DEMAND FUNDING—ACT OF CONGRESS APPROVED JUNE 25, 1890, AND LAWS OF ARIZ. 1891, ACT No. 79, APPROVED MARCH 19, 1901, CONSTRUED—WHO MAY DEMAND FUNDING.—A complaint for a peremptory writ of *mandamus* to compel the mayor and common council of the city of Tombstone to report to the loan commissioners of the territory certain warrants held by the petitioner, and to demand of said loan commissioners that they fund said indebtedness, as provided by law, is subject to demurrer as, under the act of Congress approved June 25, 1890,—it is doubtful whether it is mandatory upon the authorities of any city, unless upon the written demand of the loan commissioners, to report the bonded and outstanding indebtedness not already funded. (Bravin v. Mayor of Tombstone, 212.)

See Bonds, 3.

LOCATIONS. See Mines and Mining, 20, 21, 22, 23.

LOCATION NOTICE.

Amended. See Mines and Mining, 1, 2, 3, 4, 5.

See Mines and Mining, 1, 2, 3, 4, 5, 13, 14, 21, 22, 23.

MANDAMUS. See Loan Commission, 1.

MAPS. See Evidence, 1.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—DECREE—VALIDITY—LACK OF PROOF OF SERVICE—APPEARANCE.—This court will not inquire into the validity of a decree of divorce at the suit of the defendant therein attacked on the ground that there was no proof of service as required by

MARRIAGE AND DIVORCE (Continued).

statute, where it appears that subsequent to its entry defendant appeared and consented to the entry of an amended decree on condition that it provide that she have a portion of the community property. (Hereu v. Hereu, 270.)

2. **SAME—SAME—SAME—OPENING UP—COMP. LAWS ARIZ. 1877, PAR. 2504, CONSTRUED.**—Under paragraph 2504, *supra*, providing that in all cases where no personal service was had the court may at any time within two years allow the defendant to appear and answer, it is within the power of the court to allow the defendant in a divorce suit to file her answer and to ask to have the judgment corrected so that her rights may be protected. (Hereu v. Hereu, 270.)
3. **SAME—ACTION FOR DIVORCE—DEFENSE—PRINCIPAL AND AGENT—RATIFICATION OF ACTS—NECESSITY FOR WRITTEN AUTHORITY.**—Where a defendant in a suit for divorce appoints an agent with full power to conduct her defense, and is fully aware of every step he takes, and ratifies the same, she is bound by his acts, and the fact that such agent has no written power of attorney is immaterial. (Hereu v. Hereu, 270.)
4. **SAME—SAME—DECREE—COLLUSION AS TO FACTS—MAY CONSENT AS TO NATURE AND FORM OF DECREE.**—While courts will not render decrees of divorce where there is collusion as to the facts, parties in court may consent to the character and nature of the decree. (Hereu v. Hereu, 270.)
5. **SAME—SAME—SAME—CONSENT TO ENTRY OF AMENDED DECREE.**—Where in an action for divorce, service being had by publication, after the hearing of evidence, a decree of divorce is entered, and subsequently thereto the defendant appears and without seeking to have it set aside consents to the entry of an amended decree providing for the payment to her of half of the community property, such amended decree is not a consent decree of divorce, but is a confirmation of the first decree. (Hereu v. Hereu, 270.)
6. **SAME—SAME—SAME—VACATING—EQUITY—RELIEF AGAINST MISTAKE OF LAW.**—When defendant in a divorce suit, with full knowledge of all the facts and circumstances, consents to the entry of a decree of divorce which provides that she shall have one half of the community property, she will not be permitted to maintain an action to set aside the decree on the ground that she was advised by her counsel that such decree was binding upon her, and that she is now advised otherwise, such mistake being one of law alone. (Hereu v. Hereu, 270.)

See Equity, 6.

MASTER AND SERVANT.

1. **MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—NOTICE OF DISCHARGE—TERM CONTINUES TILL NOTICE EXPIRES.**—A provision in

MASTER AND SERVANT (Continued).

a contract which entitles the servant to notice of its termination is, in effect, an agreement to continue the term of service for that length of time after the notice, and the employer cannot dismiss the servant before the expiration of the full term without sufficient cause. (Old Dominion etc. Co. v. Andrews, 205.)

2. **SAME—SAME—SAME—WRONGFUL DISCHARGE—REMEDIES.**—When a servant is wrongfully discharged before the expiration of his term, he has his choice of two remedies: 1. He may treat the contract as continuing and recover damages for the breach thereof; or 2. He may treat the contract as rescinded, and sue on a *quantum meruit* for services actually rendered. He cannot maintain an action for his wages or salary except for past services performed. (Old Dominion etc. Co. v. Andrews, 205.)
3. **SAME—SAME—SAME—SAME—ACTION FOR DAMAGES—COMPLAINT—SUFFICIENCY—APPEAL AND ERROR—OBJECTION FIRST RAISED ON APPEAL.**—In an action for damages for breach of contract of employment, a complaint alleging a contract terminable only upon three months' notice; entry upon service and continuance therein until discharge without notice, without fault on plaintiff's part; refusal to continue plaintiff in the employment, although plaintiff had offered to so continue; refusal to pay plaintiff for time of notice required, in violation of the terms of the contract, and damages to the extent thereof, sufficiently states a cause of action as against such objection first raised on appeal, as mere formal defects will not be considered where no demurrer has been interposed below. (Old Dominion etc. Co. v. Andrews, 205.)
4. **SAME—SAME—SAME—SAME—SAME—MITIGATION OF DAMAGES—EARNINGS DURING UNEXPIRED TERM.**—In an action for damages for breach of contract of employment, by the discharge of an employee before the expiration of the term, the defendant may show in mitigation of damages what the employee has been able to earn during the remainder of the term. (Old Dominion etc. Co. v. Andrews, 205.)
5. **MASTER AND SERVANT—TERMINATION OF RELATION—ACTION BY SERVANT AGAINST MASTER FOR WAGES DOES NOT NECESSARILY OPERATE AS.**—While an employee by bringing suit puts himself in an antagonistic attitude to his employer which might be held to terminate the relation, the action of the employer in recognizing the employee as manager and superintendent and his performance of the duties, after suit filed, operates to continue in force his contract, and entitles him to recover his salary at the agreed price. (Glendale Fruit Co. v. Hirst, 428.)

MINES AND MINING.

1. **MINES AND MINING—AMENDED LOCATION NOTICE—DOES NOT GIVE NEW RIGHTS—JORDAN V. DUKE, ANTE, P. 55, FOLLOWED—EVIDENCE**

MINES AND MINING (Continued).

- ADMISSIBLE—EXCEPT AS TO INTERVENING RIGHTS.**—An amended location notice does not inaugurate any new rights, it having relation to the original location (*Jordan v. Duke, supra*, followed); and the introduction of such amended location notice is permissible, except as against the rights of parties which have accrued between the time of the original location and the amended location. (*Jordan v. Schuerman, 79.*)
2. **SAME—SAME—EVIDENCE—NONE THAT ORIGINAL LOCATION WAS INVALID.**—The making of an amended location is no proof that the original location was invalid. (*Jordan v. Schuerman, 79.*)
3. **SAME—LOCATION NOTICE—EVIDENCE—PRIMA FACIE AS TO ACTS RECITED AS HAVING BEEN DONE.**—A location certificate is under the laws of this territory *prima facie* evidence that the acts set out therein have been performed by the locators of the claim. (*Jordan v. Schuerman, 79.*)
4. **MINES AND MINING—AMENDED LOCATION NOTICE—EVIDENCE—NOT CHANGING RIGHTS—HARMLESS ERROR.**—The introduction of an amended location notice, made with reference to the original location, for the purpose of curing possible errors therein, is harmless although useless, there being no contest as to the original location being invalid in any other way than that the ground at the time such location was made was not subject to location. (*Jordan v. Duke, 55.*)
5. **SAME—LOCATION NOTICES—RECORDING ACT—LAWS 1895, ACT NO. 42, APPROVED MARCH 20, 1895; REV. STATS. ARIZ. 1887, PAR. 2349, CITED—REGISTRATION ACT—CONSTRUCTIVE NOTICE.**—Prior to the statute, *supra*, there was no penalty attached to a failure to record a location notice. The law, *supra*, prior to that time was in effect but a registration act, and location notices recorded under it simply imparted constructive notice as any other registration act. (*Jordan v. Duke, 55.*)
6. **MINES AND MINING—ASSESSMENT-WORK—RESUMPTION OF WORK—PREVENTS FORFEITURE—UNTIL FAILURE TO COMPLETE WORK.**—If assessment-work be not completed on a mining claim in any part of the year in which the statute requires it to be done, but the owners thereof are upon the ground for the purpose of doing the work before the year expires, and then prosecute the work to completion, the work so prosecuted will have relation to the year in which it should have been done, and such resumption will prevent the claim from being forfeited until there is a failure to prosecute the work after the same has been resumed. (*Jordan v. Duke, 55.*)
7. **SAME—RELOCATION, WHEN VALID.**—Until a location has been abandoned or has been forfeited no other location can be made of the ground. (*Jordan v. Duke, 55.*)

MINES AND MINING (Continued).

8. **SAME—ASSESSMENT—WORK—RESUMPTION OF WORK—AFTER EXPIRATION OF YEAR AND BEFORE OTHER RIGHTS ATTACH.**—If the first locator of mining ground resumes work at any time even after the expiration of the year, but before other rights attach in favor of relocation, he preserves his claim. (*Jordan v. Duke*, 55.)
9. **SAME—SAME—SAME—RELOCATION—SUBSEQUENT FORFEITURE—RELATION.**—Where the locators of mining ground were upon it the last day of December and asserted they were there for the purpose of resuming work, and continued in possession for five or six days afterward, making an expenditure of sixty dollars, when they went away and never returned, an attempted relocation made by other parties on the first day of January is void, the former claim not being subject to relocation until the owners quit work, several days thereafter, there being no such thing as making a location of ground not open to relocation by reason of being already relocated, and then, because of failure on the part of the owners to support that claim either by abandonment or forfeiture, have the relocation relate back to the original act. (*Jordan v. Duke*, 55.)
10. **MINES AND MINING—CONTRACT OF SALE—FORFEITURE OF MILL PROVIDED TO BE BUILT ON OR ADJACENT TO THE MINE—WILL NOT BE ENFORCED WHEN BUILT OFF THE PROPERTY SOLD.**—Where a contract for the sale of a mine provided that the purchaser should build a mill on "or adjacent" to a mine, and in case of failure to comply with the express condition of the contract, the mine and all improvements placed on "or adjacent to" said mines, including said mill, should be forfeited to the vendors, equity will not enforce said forfeiture clause, in so far as it affects the mill and machinery constructed on property not the subject of sale between the parties. (*Henry v. Mayer*, 103.)
11. **MINES AND MINING—CONTRACT OF SALE—POSSESSION—ACCOUNTING—OWNER WRONGFULLY TAKING POSSESSION MUST ACCOUNT FOR PROFITS TO ONE ENTITLED THERETO.**—Where the owner of a mine wrongfully takes the possession thereof from one entitled thereto under a contract of purchase, he must account for all profits derived from the working of said mine while so wrongfully in possession. (*Henry v. Mayer*, 103.)
12. **MINES AND MINING—FORFEITURE—EVIDENCE—BURDEN OF PROOF.**—Forfeiture of a mining claim for failure to perform the necessary amount of work thereon, cannot be established except upon clear and convincing proof of the failure of the former owner to have the work performed, and the burden of proof is upon the party alleging the forfeiture. (*Providence Gold Min. Co. v. Burke*, 323.)
13. **SAME—LOCATION NOTICE—RECITALS IN—ADMISSIONS.**—A location notice asserting that it is a relocation of another claim constitutes an implied admission of the validity of the first location. (*Providence Gold Min. Co. v. Burke*, 323.)

MINES AND MINING (Continued).

14. **SAME—SAME—SUFFICIENCY OF NOTICE—EVIDENCE—ADMISSIBILITY**—KINNEY v. FLEMING, ANTE, P. 263, 56 PAC. 723, APPROVED.—Where all the monuments are upon the ground, a location notice of a mining claim is admissible in evidence although the direction of the closing location line is indefinitely described, the location being sufficient in all other particulars. (Providence Gold Min. Co. v. Burke, 323.)
15. **SAME—CITIZENSHIP—PROOF OF—EVIDENCE.**—The whereabouts of one of the locators of a mining claim not being ascertainable, and his citizenship being questioned, evidence is admissible as tending to show his citizenship; that he had made declarations of his citizenship to his friends and companions; that he had voted at elections in Arizona; that his name appeared upon the great register of Yavapai County; and that while a resident of Arizona he had located many mining claims, under declarations that he was a citizen of the United States. (Providence Gold Min. Co. v. Burke, 323.)
16. **SAME—SAME—JOINT LOCATORS—CITIZENSHIP OF ONE SUFFICIENT TO GIVE TITLE, WHERE BOTH CONVEY.**—Where joint locators of a mining claim transfer the same by deed, the non-citizenship of one would not make the location invalid, and the grantee would obtain a perfect title to a valid mining location unaffected by such non-citizenship. (Providence Gold Min. Co. v. Burke, 323.)
17. **MINES AND MINING—FRAUD—MINING REPORT—SUBSTITUTING ORES—EVIDENCE—INSUFFICIENT TO JUSTIFY REVERSAL OF FINDINGS.**—Evidence that the report of the expert employed by the purchaser of a mine, whose competency and honesty were not impeached, grossly exaggerated the value of its ore, and that there was abundant opportunity for substitution of ores, upon which the report was based, by the vendors and their agents, while sufficient to justify a suspicion that the expert had been deceived in their values, does not warrant a reversal of the finding of the trial court that there was no fraud or knowledge of fraud on the part of the vendors in inducing the vendee to enter into a contract for the purchase of the mine. (Henry v. Mayer, 103.)
18. **SAME—SALES—VENDOR AND VENDEE—PRINCIPAL AND AGENT—COMMISSION—FRAUDULENT REPRESENTATIONS AS TO AMOUNT—RECOVERY.**—Where the vendor of a mine and his agent represent to the vendee that there is to be no commission paid other than five thousand dollars to this agent, and it is admitted that at the time the agent was to receive, and did receive, twenty-five thousand dollars, the vendee is entitled in equity in an action against the vendor to a reduction in the purchase price to the extent of the fraudulent commission. (Henry v. Mayer, 103.)
19. **SAME—EQUITY—MISREPRESENTATIONS—FORFEITURE INDUCED BY—RIGHT TO POSSESSION.**—A plaintiff who had advanced all the funds

MINES AND MINING (Continued).

and was the owner of practically all of the stock of a corporation operating a mine under a contract of purchase was induced by the representations as to what could be done with the property, made by a man who subsequently proved to be the agent of the owner of the mine, to pay off a large indebtedness of the company, to advance funds, enter into a new agreement regarding payment for the mine, and to permit this agent to run the property. The agent operated it for several months, and until debts not reported to the owner had so accumulated as to render further concealment impossible. He then, without notifying the corporation or plaintiff, turned the property over to the owner, who took possession under a forfeiture clause in his contract of sale. The circumstances were such as to justify the belief that at the time of entering into the new arrangement and agreement for the payment for the mine it was impossible that it could be successfully carried out. Plaintiff having put himself in a worse position in regard to the purchase than before he acted on the representations of the owner's agent, the taking possession was unwarranted, and the decree, in so far as it recognized the owner's right to the possession, was erroneous. (*Henry v. Mayer*, 103.)

20. MINES AND MINING—LOCATIONS—ABANDONMENT—EVIDENCE—RELOCATION.—A mining claim was located in the name of four persons, by one person, who testified he wrote the names of the other co-locators to the location notice, and only one of the others had anything to do with the claim, and that, after making a little monument and sinking about three feet, he and the one of his partners mentioned decided that it was no good, destroyed the monument, and abandoned it. Upon such abandonment the ground is subject to immediate relocation by others without waiting until the location became forfeited by reason of non-compliance with the statute requiring the sinking of a discovery shaft, recording notice, and building the monuments within ninety days. (*Kinney v. Fleming*, 263.)
21. SAME—SAME—EVIDENCE—LOCATION NOTICE—ACTS OF LOCATION INDEPENDENT OF NOTICE.—Where an action to quiet title to mining ground is brought before the expiration of the time allowed by statute for the filing of the notice of location, acts of location, independent of the certificate of location, are admissible. (*Kinney v. Fleming*, 263.)
22. SAME—SAME—LOCATION NOTICE—LAWS ARIZ. 1895, ACT NO. 42, SECS. 1, 2, CONSTRUED—SUFFICIENCY OF NOTICE—EVIDENCE.—Location notice examined and held to be a sufficient compliance with the requirements of the statute, *supra*, to be admissible in evidence. (*Kinney v. Fleming*, 263.)
23. SAME—SAME—SAME—MINE "PERMANENT MONUMENT" WITHIN THE MEANING OF LAWS ARIZ. 1895, ACT NO. 42, SEC. 1—POSITION OF

MINES AND MINING (Continued).

MINE—A mine referred to by name, as was the Joyce Mine, is a permanent monument, within the meaning of the statute, *supra*, and if the claim is stated to lie "just east of the Joyce Mine," its position is defined. (Kinney v. Fleming, 263.)

- 24. MINES AND MINING—SUIT TO QUIET TITLE—REV. STATS. ARIZ. 1887, PAR. 3132, AS AMENDED, LAWS 1891, ACT NO. 46, CITED—ISSUES—GENERAL DENIAL—CROSS-COMPLAINT SETTING UP TITLE IN DEFENDANTS—APPEAL AND ERROR—INSTRUCTION AND EVIDENCE—ERROR AFFECTING GOVERNMENT, WHEN REVIEWED.**—Where in an action to quiet title to mining ground, brought under the provisions of the statute, *supra*, the defendants go to trial upon a general denial only, the whole issue is as to the validity of the plaintiffs' claim and the right of plaintiffs to maintain the same as against the government; but where defendants have filed a cross-complaint, setting up a claim within themselves, the issue becomes one between the plaintiffs' claim and the government, between defendants' claim and the government, and between plaintiffs' and defendants' claims. In such contests, where a verdict is rendered for either claimant and against the government, evidence and instructions pertinent to the issues as to whether the successful claimants' location was valid as against the government become immaterial and will not be reviewed on appeal. (Jordan v. Duke, 55.)

See Vendor's Lien, 1.

MINING REPORT. See Mines and Mining, 17.

MISJOINDER.

Of causes. See Pleadings, 10.

Of parties. See Pleadings, 10.

MISREPRESENTATION. See Equity, 10; Mines and Mining, 18, 19.

MISTAKE OF LAW.

Relief against. See Equity, 2; Marriage and Divorce, 6; Mortgages, 3.

MONUMENT.

Permanent. See Mines and Mining, 23.

MORTGAGES.

- 1. MORTGAGES—FORECLOSURE—CODE PRACTICE—PARTIES DEFENDANT—GRANTEES ASSUMING DEBT—DEFICIENCY JUDGMENT.**—Under the code practice, where no distinction exists between actions at law and suits in equity, a mortgagee may, in a foreclosure suit, join as a party defendant a grantee of his mortgagor who has assumed the payment of the debt, and recover a deficiency judgment as against him. (Johns v. Wilson, 125.)

MORTGAGES (Continued).

2. **SAME—SAME—SUPPLEMENTAL FORECLOSURE—FRAUDULENT CONCEALMENT OF INTEREST OF DEFENDANT.**—The right to a supplemental foreclosure as to the interest of a party whose title was fraudulently concealed by defendants from plaintiff until after the former suit was commenced is undoubted. (*Johns v. Wilson*, 125.)
3. **SAME—SAME—SAME—SAME—MISTAKE OF LAW—TO PRECLUDE RELIEF FACTS MUST BE KNOWN—FRAUD.**—The doctrine that where the plaintiff has made a mistake of law the court has no jurisdiction to grant relief has reference to cases where the facts are known and no fraud or deceit has been practiced. Where the defendants fraudulently induced a mortgagee to omit a necessary party defendant by fraudulently concealing his interest in the property until after the foreclosure suit was commenced, he is entitled to relief by a supplemental foreclosure. (*Johns v. Wilson*, 125.)
4. **SAME—SAME—VOID DEED CONTAINING ASSUMPTION OF DEBT—PERSONAL JUDGMENT FOR DEFICIENCY AS AGAINST GRANTEE—ERROR.**—Where a deed conveying mortgaged property and containing a covenant by the grantee to assume and pay the mortgaged indebtedness is adjudged fraudulent and void, it is error to enter a personal judgment against such grantee for the deficiency. (*Johns v. Wilson*, 125.)
5. **MORTGAGES—FORECLOSURE—JUDGMENT—IN VACATION—VOID.**—A judgment of foreclosure entered in vacation by a judge is not merely voidable but void, as, under the Organic Act and the statutes of the territory, the court, and not the judge, has jurisdiction to foreclose mortgages. (*Babbitt v. Field*, 6.)
6. **SAME—SAME—PLEADING—ABATEMENT—JUNIOR MORTGAGOR—FORMER FORECLOSURE TO WHICH HE WAS NOT A PARTY.**—A junior mortgagor not a party to former foreclosure cannot plead a judgment of foreclosure therein in abatement of a subsequent suit in which he is made party defendant to foreclose the same mortgage. (*Babbitt v. Field*, 6.)
7. **MORTGAGES—FORECLOSURE—WRIT OF ASSISTANCE—PURCHASER WITHOUT NOTICE—KNOWLEDGE.**—Where the purchaser at a foreclosure sale files an application for a writ of assistance against the lessee of one who had purchased pending the foreclosure proceedings, the lessee's claim that the lessor was a purchaser for value without notice, and that he, the lessee, had no notice of purchaser's claim, is not sustainable, where the lessor had knowledge of the suit prior to his purchase, and the lessee was present when the lessor made a tender for the redemption of the property. (*Daggs v. Wilson*, 388.)
8. **SAME—REDEMPTION—TENDER—VALIDITY OF—TITLE 26, REV. STATS. ARIZ. (SECS. 19-23, ACT NO. 20, LAWS 1889), CONSTRUED.**—Where the statute, *supra*, provides for redemption, only by "payment to the purchaser, or for him to the officer who made the sale," tender

MORTGAGES (Continued).

of the amount for which the property had been sold, to parties who were not authorized to receive the money or to act for the purchaser, does not constitute a valid and sufficient tender. (*Daggs v. Wilson*, 388.)

See Writ of Assistance, 1.

MOTION.

For new trial. See Trial, 1.

To dismiss. See Appeal and Error, 13; Contracts, 1.

MULTIFARIOUSNESS.

Dismissal. See Pleadings, 14.

Dismissed because of, on court's own motion. Pleadings, 18.

How raised. See Pleadings, 12.

Waived. See Pleadings, 12.

When enforced. See Pleadings, 11.

See Corporations, 5; Pleadings, 8, 9, 10, 11, 12, 13, 14.

MUNICIPAL BONDS. See Statutory Construction, 2.

MURDER. See Criminal Law, 6, 7, 8, 9.

NATIONAL BANKS. See Taxes and Taxation, 11, 12.

NEGLIGENCE. See Innkeepers, 2.

NEGOTIABLE INSTRUMENTS.**1. NEGOTIABLE INSTRUMENTS—FORGERY—PROMISE TO PAY—ESTOPPEL—**

ADOPTION.—Where parties had formerly been sureties upon a note of Kirkland, and, to secure an extension of the indebtedness, Kirkland gave the payee a new note, to which he had forged the names of the sureties, they will not be estopped to deny the genuineness of their signatures to the new note by having, in ignorance of the facts, after the maturity of the note and without consideration, promised to pay it. Nor do such promises constitute an adoption of the forgeries. (*Barry v. Kirkland*, 1.)

See Evidence, 2.

NEW TRIAL.

- 1. NEW TRIAL—GROUNDS—SURPRISE—DILIGENCE—TAKING CHANCES ON JUDGMENT—WHEN AVAILABLE.**—Surprise which is the result of no lack of diligence, and which operates to the prejudice of the party surprised upon the trial, and prevents his obtaining evidence material and competent, is a good ground for the granting of a new trial. The party affected, however, must first have exhausted all his other remedies before he is entitled to a new trial. He will not be permitted to take his chances of obtaining

NEW TRIAL (Continued).

a verdict or decision, and to then for the first time avail himself of the point on motion for a new trial. (Walker v. Gray, 359.)

2. **SAME—SAME—SAME—RECORD REVIEWED AND HELD NOT TO WARRANT NEW TRIAL.**—Where the record shows that the testimony claimed to be a surprise was given at the commencement of the first trial, which lasted thirteen days; that no application was made therein for a continuance to meet the testimony; that at the close of the testimony no application was made for a postponement of the second case, nor suggestion made that additional witnesses, not present, were required to meet the same; that appellant willingly entered upon the trial of the second cause under a stipulation that the proof in the first case should be the proof in the second, and allowed it to go to judgment, having lost, he will not be heard to complain because of insufficient preparation; and an application for a new trial of the second case, upon the ground of surprise, is properly denied. (Walker v. Gray, 359.)

See Criminal Law, 2.

NOTE.

Giving of, only prima facie evidence of settlement of accounts.

See Evidence, 2.

See Interest, 1.

NOTICE.

Of discharge. See Master and Servant, 1, 2, 3, 4.

Of dismissal. See University of Arizona, 1.

Of intention to renew lease, failure to give, when excusable. See Landlord and Tenant, 3.

See Taxes and Taxation, 2, 13.

NUNC PRO TUNC ENTRY. See Appeal and Error, 9.

OFFICE AND OFFICERS.

1. **OFFICE AND OFFICERS—BONDS—SURETIES—SEVERALLY LIABLE—REV. STATS. ARIZ. 1887, PAR. 3081, CONSTRUED—NECESSITY FOR SIGNATURE OF PRINCIPAL.**—Sureties signing an official bond, given under the provisions of paragraph 3081, *supra*, become severally liable, and where the principal is obligated by law to pay over money collected by him as tax-collector, the sureties who have guaranteed the fulfillment of the obligation cannot avoid their responsibility because their principal did not sign the bond with them. (Snyder v. Pima County, 41.)
2. **SAME—SAME—DEFECTIVE—PRINCIPAL AND SURETIES EQUITABLY BOUND UNDER REV. STATS. ARIZ. 1887, PAR. 3086.**—A bond guarantying the fulfillment of official obligations which does not conform to the statute may be recovered upon under the provisions of para-

OFFICE AND OFFICERS (Continued).

graph 3086, *supra*, that when an official bond is defective it is not void, but the officers and sureties are equitably bound. (*Snyder v. Pima County*, 41.)

3. **OFFICE AND OFFICERS—JAILER—POWER OF BOARD OF SUPERVISORS TO FIX SALARY—LAWS ARIZ. 1893, ACT NO. 87, CONSTRUED—REDUCTION OF SALARY—IMPLIED ACCEPTANCE—CANNOT QUESTION REASONABLENESS IN ABSENCE OF ALLEGATIONS ATTACKING GOOD FAITH.**—Under the statute, *supra*, providing that the board of supervisors shall fix the compensation of the jailer, at not exceeding one hundred dollars per month, the board has the power to reduce the salary of the jailer during his term of office, and where such jailer continues to perform the duties of the office he impliedly accepts such reduction, and, in absence of any allegation impugning the good faith of the board, is precluded from maintaining an action upon a *quantum meruit* against the county. (*Truman v. County of Pinal*, 191.)
4. **OFFICE AND OFFICERS—SHERIFF—OFFICIAL BOND—SURETIES—LIABILITY OF FOR TRESPASS IN LEVY OF ATTACHMENT ON GOODS OF THIRD PERSON.**—The taking by a sheriff upon a writ of attachment against one person of the goods of another is a breach of the condition of a sheriff's bond, for which his sureties are liable. (*Gray v. Noonan*, 36.)
5. **SAME—SAME—SAME—PLEADING—CAUSES OF ACTION—VIOLATION OF DUTY—BREACH OF BOND—SEPARATE CAUSES.**—In an action against the sureties upon a sheriff's bond for violation of his official duty the cause of action is the breach of the bond, and not primarily the violation of duty. (*Gray v. Noonan*, 36.)
6. **SAME—SAME—SAME—SAME—AGAINST SHERIFF FOR TRESPASS—AGAINST SURETIES FOR BREACH OF BOND—CUMULATIVE REMEDIES.**—The right of action against a sheriff for trespass and the right of action against the sureties upon his official bond for breach of his official duty in committing such trespass are cumulative remedies merely, and are not alternative remedies requiring an election; and a judgment against the sheriff individually for such trespass does not extinguish the obligation of the sureties. (*Gray v. Noonan*, 36.)

OPINION.

When necessary to be in writing. See Appeal and Error, 17.

ORDERS.

Appealable, what are. See Appeal and Error, 1, 2.

OUSTER. See Ejectment, 2.

PAROL CONTRACT.

What evidence insufficient to sustain. See Contracts, 1.

PARTIES.

1. **PARTIES—DEFENDANT—TRANSFER OF INTEREST—ADDING PARTY—REV. STATS. ARIZ. 1887, PAR. 725, CITED.**—It is not reversible error for the trial court to allow a person who has purchased defendants' claim pending the action to be added as a party defendant, plaintiffs not being injured thereby. The statute, *supra*, providing for substitution of parties where there is a transfer of interest, cited. (*Jordan v. Duke*, 55.)

See Appeal and Error, 19; Mortgages, 1; Pleadings, 15.

PAYMENT. See Pleadings, 4.

PEREMPTORY INSTRUCTION.

Similarity to demurrer to evidence. See Practice, 1.

PERMANENT MONUMENT. See Mines and Mining, 23.

PERSONAL PROPERTY. See Taxes and Taxation, 11.

PLEADINGS.

1. **PLEADING—ANSWER—CROSS-COMPLAINT—NATURE OF TO BE DETERMINED BY DEFENSE.**—The character of a pleading, and whether it be an answer or a cross-complaint, must be determined from the nature of the defense as made, no matter what the pleader may choose to term it. (*McClintock v. Bolton*, 370.)
2. **SAME—SAME—TENDER—DEFENSE—NEEDS NO REPLICATION.**—Tender, like a plea of payment, is but a defense, and, when set up in an answer, needs no replication, under our system of pleading. (*McClintock v. Bolton*, 370.)
3. **SAME—SAME—FORECLOSURE—INVALIDITY OF INDEBTEDNESS—REQUIRES NO ANSWER.**—A plea to a suit to foreclose a mortgage, denominated a cross-complaint, setting up that the note and mortgage sued upon did not represent a valid indebtedness, is in effect a denial that the mortgages were valid and subsisting liens against the premises, matter which the court was required to find before any valid judgment of foreclosure could be made, and is not in the nature of a cross-complaint, and requires no answer. (*McClintock v. Bolton*, 370.)
4. **PLEADING—ANSWER—PAYMENT—NECESSITY FOR PLEADING ITEMS—REV. STATS. ARIZ. 1887, PAR. 742, CONSTRUED.**—Paragraph 742, *supra*, providing that where defendant desires to prove any payment, he shall file with his plea an account, stating the nature of such payment and the several items thereof, or be precluded from proving the same, does not apply to a plea to an action on a note "that the defendant fully paid said plaintiff the amount due on said note." (*Cheda v. Skinner*, 196.)
5. **PLEADINGS—COMPLAINT—FAILURE TO STATE CAUSE OF ACTION—DEFECT NEVER WAIVED—VACATION OF ORDER OVERRULING DEMURRER**

PLEADINGS (Continued).

- JUDGMENT ON PLEADINGS.**—The insufficiency of the facts stated in the complaint to constitute a cause of action is a radical defect which is never waived, and may be raised at any time, and the court can, upon cause shown, or its own motion, vacate its order overruling a demurrer thereto and then sustain such demurrer, or it can, after vacating such order, on motion, render judgment on the pleadings. (*Reilly v. Perkins*, 188.)
6. **PLEADING—CONTRACTS—EVIDENCE—SUFFICIENCY.**—An averment that defendant promised to pay plaintiffs seven dollars per thousand for all brick laid up in the walls of an additional building, according to the terms of a certain contract (with no terms given, except the defendants' promise to pay and plaintiffs' agreement to furnish materials and perform the labor), states a cause of action. (*Adams v. O'Connor*, 404.)
7. **PLEADING—JOINDER OF CAUSES—REFORMATION OF CONTRACT—DAMAGES FOR BREACH.**—A demurrer to a complaint joining a cause of action for reformation of a contract with one for damages arising from a breach of the contract as reformed is properly overruled, the code procedure not only permitting but encouraging the combination of actions arising out of the same transaction. (*Pringle v. Hall*, 284.)
8. **PLEADING—MULTIFARIOUSNESS—CODE PLEADING.**—The objection of multifariousness in a pleading is applicable under the code practice as under the ancient equity practice, and the same rules govern. (*Henshaw v. Salt River etc. Co.*, 151.)
9. **SAME—SAME—DEFINED.**—By multifariousness is meant the improper joining in one bill of distinct and independent matters, and thereby confounding them,—as the joining in one bill of several matters perfectly distinct and disconnected against one defendant, or the demanding of several matters of a distinct and independent nature against several defendants in the same bill. (*Henshaw v. Salt River etc. Co.*, 151.)
10. **SAME—SAME—MISJOINDER OF CAUSES OF ACTION—MISJOINDER OF PARTIES.**—An objection that a bill contains several distinct and disconnected matters against one defendant is, strictly speaking, one of misjoinder of causes of action, and an objection that a bill contains independent and distinct demands against several defendants is one of misjoinder of parties. (*Henshaw v. Salt River etc. Co.*, 151.)
11. **SAME—SAME—WHEN ENFORCED.**—The rule which prohibits multifariousness in a pleading is based upon expediency, and is enforced when distinct matters are so intermingled as to embarrass the defendant in his defense or to render it impracticable for the court to frame a satisfactory decree. (*Henshaw v. Salt River etc. Co.*, 151.)

PLEADINGS (Continued).

12. **SAME—SAME—RAISED BY DEMURRER—OTHERWISE WAIVED.**—The objection to multifariousness in a complaint must be taken by demurrer; otherwise, it is waived. (*Henshaw v. Salt River etc. Co.*, 151.)
13. **SAME—SAME—BILL MAY BE DISMISSED ON COURT'S OWN MOTION.**—The court may at any stage of the proceedings before judgment, of its own motion, dismiss a bill which contains the vice of multifariousness. (*Henshaw v. Salt River etc. Co.*, 151.)
14. **SAME—SAME—DISMISSAL—DISCRETIONARY—APPEAL AND ERROR—REVIEW.**—The action of the court in dismissing a bill for multifariousness, whether on demurrer or of its own motion, is a matter of discretion, and will not be disturbed, unless substantial justice requires it. (*Henshaw v. Salt River etc. Co.*, 151.)
15. **PLEADING—PARTIES—NON-JOINDER OF PARTIES—OBJECTION, HOW RAISED—DISMISSAL, WHEN WARRANTED—ORDERING ADDITIONAL PARTIES TO BE BROUGHT IN—RIGHT TO REOPEN CASE—TRIAL WITHOUT OBJECTION—DISMISSAL PREJUDICING RIGHTS OF PLAINTIFFS—APPEAL AND ERROR—REVIEW—RELIEF.**—Where many of the grievances complained of by plaintiffs involved the transactions of persons not parties to the action, such defect, if raised by the pleadings, might properly be held to be sufficient reason for the dismissal of the action. Otherwise, the court has the power to order such persons brought in and made parties defendant before entering a decree. The fact that, had such parties chosen, they would have had the right to have had the entire case reopened in so far as their rights were involved, with the attendant inconvenience and expense to the remaining defendants, in the absence of any other consideration, would justify the trial court in dismissing the action as a proper exercise of judicial discretion. But in an action involving the rights of third persons, tried without the objection of want of parties being raised, the trial court should have ordered new parties defendant to have been brought in instead of dismissing the action where such dismissal operates oppressively upon the plaintiffs and to their substantial disadvantage, as where the grievances complained of are such as make it probable that the bar of the statute of limitations might be successfully interposed were plaintiffs required to bring a new action; and in case of such dismissal this court will correct the action of the trial court and vacate the order, and grant leave to plaintiffs either to file a supplemental bill bringing in additional parties defendant or to amend the complaint so as to render this unnecessary, as they shall elect. (*Henshaw v. Salt River etc. Co.*, 151.)
16. **PLEADING—SPECIAL MATTERS OF DEFENSE—NO NECESSITY FOR REPLY.**—A reply traversing special matters of defense set up in an answer is, under the practice in the territory, unnecessary. (*Old Dominion etc. Co. v. Andrews*, 205.)

PLEADINGS (Continued).

17. PLEADING—STATUTE OF LIMITATIONS—REV. STATS. ARIZ. 1887, PAR. 2328, CONSTRUED—DEMURRER—ANSWER, WHEN PROPER.—Under paragraph 2328, *supra*, providing that the laws of limitation shall not be made available unless it be specially set forth as defense in the answer where the bar of limitations appears on the face of the pleadings it can be pleaded by demurrer. In cases where the bar exists as a matter of fact, but is not shown on the face of the complaint, and must be established by evidence *aliunde*, the statute must be pleaded by way of answer. A demurrer is considered for such purpose an answer to that extent, and thus is reconciled to the requirements of the above statute. (Wagner v. Boyce, 71.)
18. SAME—ANSWER—CONSTRUCTION.—A pleading called an answer which has in it the elements that constitute an answer rather than a demurrer will be treated as such although worded in part after the manner of a plea by demurrer. (Wagner v. Boyce, 71.)
19. SAME—SAME—STATUTE OF LIMITATIONS—SUFFICIENCY.—Allegations contained in an answer setting up the bar of the statute of limitations, "That at all times since the said seventh day of October, 1893, the defendants have been within the territory of Arizona, and have been under no disability that would suspend the statute of limitations," are material allegations of fact, that entitle the defendants to support them by evidence in the trial of the case. (Wagner v. Boyce, 71.)
20. SAME—SAME—SAME—NECESSITY FOR VERIFICATION—REV. STATS. ARIZ. 1887, PAR. 735, SUBD. 11, AND PAR. 1880, CITED AND CONSTRUED.—An unverified answer pleading the bar of the statute of limitations to a verified complaint setting up an open account is not within the provisions of paragraph 735, subdivision 11, or paragraph 1880, *supra*, requiring a verified answer, for the reason that such answer does not deny the account or any item thereof. (Wagner v. Boyce, 71.)

See Appeal and Error, 7; Claim and Delivery, 1; Continuance, 1; Corporations, 4, 5; Counties, 2, 5; Fraudulent Conveyances, 1; Injunction, 3, 5; Judgment on Pleadings, 2; Mortgages, 6; Office and Officers, 5, 6.

POSSESSION. See Claim and Delivery, 1, 6; Mines and Mining, 11, 19.

PRACTICE.

1. PRACTICE—JURY—PEREMPTORY INSTRUCTION—SIMILARITY TO DEMURRER TO EVIDENCE—ROBERTS v. SMITH, 5 ARIZ. 368, 52 PAC. 1120, FOLLOWED.—When it appears to the trial court that upon the case made by plaintiff's evidence, all taken as true, the defendant is not liable, the proper practice under the Arizona statute is for the court, upon motion, to instruct the jury to return a verdict fo

PRACTICE (Continued).

defendant. The motion for a peremptory instruction is substantially the same as the common-law demurrer to the evidence. (*Haff v. Adams*, 395.)

See Mortgages, 1.

PRESUMPTIONS. See Appeal and Error, 10, 22, 23, 32; Counties, 1, 2, 3; Evidence, 2.

PRINCIPAL AND AGENT.

1. **PRINCIPAL AND AGENT—EVIDENCE OF AGENCY—OPTION TO PURCHASE PROPERTY.**—Where an option to purchase is nothing more than an authorization of the holder to find a purchaser, and for such service he is to receive a commission on the amount of the purchase money, he will be held to be the mere agent of the owners in effecting a sale. (*Henry v. Mayer*, 103.)

See Marriage and Divorce, 3; Mines and Mining, 18.

PRIORITIES. See Appeal and Error, 19; Irrigation, 1, 2.

PURCHASER WITH NOTICE. See Mortgages, 7.

QUALIFICATION OF VOTER. See Elections, 1, 2, 3.

RANGE CATTLE. See Attachment, 2.

RANGE STOCK. See Attachment, 3.

RATIFICATION. See Marriage and Divorce, 3.

REAL PROPERTY.

1. **REAL PROPERTY—CONVEYANCE BY HUSBAND TO WIFE VALID—COMMON LAW—LAWS ARIZ. 1885, ACT NO. 68, CONSTRUED—COMP. LAWS ARIZ. 1877, PAR. 1960 ET SEQ., CITED.**—Act No. 68, *supra*, adopting the common law so far as not inconsistent with the laws of the territory, etc., does not adopt the rule of common law as it prevailed when the wife was the mere chattel of the husband, that a deed between husband and wife was void, as that rule is inconsistent with paragraph 1960 et seq., *supra*, conferring enlarged and separate rights upon married women. (*Luhrs v. Hancock*, 340.)

See Vendor's Lien, 1.

REASONABLE DOUBT. See Criminal Law, 5.

RECORD.

Failure to file transcript of, prevents further review by appeal or writ of error. See Appeal and Error, 15.

See Appeal and Error, 10, 20, 22, 23, 24, 25, 32; New Trial, 2; Taxes and Taxation, 3.

RECORDING ACT. See Mines and Mining, 5.

REDEMPTION. See Mortgages, 8.

REFORMATION. See Sureties, 1.

REGENTS. See University of Arizona, 1.

REGISTRATION ACT. See Mines and Mining, 5.

RELATION. See Mines and Mining, 9.

RELIEF. See Pleadings, 15.

RELOCATION. See Mines and Mining, 7, 9, 20.

REMARKS OF ATTORNEY.

Prejudicial, not in record will not be reviewed. See Appeal and Error, 25.

REMEDIES. See Master and Servant, 2; Office and Officers, 6.

REPLICATION. See Pleadings, 2.

RES ADJUDICATA.

1. **RES ADJUDICATA—INTERLOCUTORY ORDERS—ORDER OVERRULING DEMURRER MAY BE RESCINDED AT ANY TIME PRIOR TO FINAL JUDGMENT.**—An order overruling a demurrer to a complaint, being an interlocutory order, is always under the control of the court until the final decision of the suit, and may be rescinded upon sufficient ground shown even after the term at which made, and is not therefore a final judgment to which only the doctrine of *res adjudicata* can apply. (Reilly v. Perkins, 188.)

See Appeal and Error, 8, 34.

RESCISSION. See Landlord and Tenant, 6.

RETREAT.

No duty to, when assaulted. See Criminal Law, 7.

REVERSAL. See Appeal and Error, 18, 28, 30.

REVERSIBLE ERROR. See Appeal and Error, 30.

REVIEW.

Scope of. See Criminal Law, 1, 2, 3.

See Appeal and Error, 24, 25, 26, 28, 29, 30, 31, 33; Equity, 9, 11, 12; Pleadings, 14, 15; Taxes and Taxation, 3.

SALARY. See Office and Officers, 3.

SALES. See Mines and Mining, 18; Vendor and Vendee, 1.

SELF-DEFENSE. See Criminal Law, 7, 8.

SEPARATE ESTATE.

Wife's liability for husband's debts. See Husband and Wife, 1.

SERVICE.

Lack of proof of. See Marriage and Divorce, 1.

SHARES OF STOCK.

Defined. See Corporations, 2.

See Taxes and Taxation, 12.

SHERIFF. See Office and Officers, 4, 6.

SPECIFIC PERFORMANCE. See Contracts, 3; Landlord and Tenant, 2, 3.

STATEMENT OF FACTS.

Necessity for. See Criminal Law, 4.

STATUTES.

1. **STATUTES—ADOPTION—WITH CONSTRUCTION OF THE COURTS OF THAT STATE.**—Where a statute has been adopted from the code of another state, by implication, it was adopted with the construction which has been theretofore placed upon it by the supreme court of that state. (*Cheda v. Skinner*, 196.)

STATUTE OF LIMITATIONS. See Counties, 4, 5, 6; Ejectment, 2; Irrigation, 3; Judgment on Pleadings, 1; Pleadings, 17, 19, 20; Tenancy in Common, 1.

STATUTORY CONSTRUCTION.

1. **STATUTORY CONSTRUCTION—CONSTITUTIONAL LAW—AMBIGUITY—UNCERTAINTY.**—In construing statutes in part unconstitutional, the rule is, that whenever, after striking out unconstitutional portions, that which remains is so ambiguous in its meaning that the legislative intent cannot be with reasonable certainty ascertained, the whole act must fall. (*Cronly v. City of Tucson*, 235.)
2. **SAME—ELECTIONS—MUNICIPAL BONDS—ACT OF CONGRESS OF MARCH 4, 1898, CONSTRUED—TWO THIRDS OF QUALIFIED VOTERS INTERPRETED.**—In the statute, *supra*, providing for the issuance of bonds for municipal purposes when authorized by the affirmative vote of two thirds of the qualified voters, cast at an election to be held as

STATUTORY CONSTRUCTION (Continued).

therein specified, the proper construction of the term "two thirds of the qualified voters" is not two thirds of those qualified to vote, but two thirds of those qualified and actually voting. (*Cronly v. City of Tucson*, 235.)

3. **STATUTORY CONSTRUCTION—LITERAL READING ABSURDITY—REFORMATION TO ARRIVE AT INTENT OF LAW—LAWS ARIZ. 1897, ACT No. 51, SEC. 4, REFORMED.**—When adherence to the punctuation and wording of a statute results in manifest absurdity and inconsistency, evident mistakes, omissions, and the improper use of words may be remedied, and even the structure of sentences altered, in order to arrive at the purpose and intent of the law. Statute, *supra*, reformed. (*Western Investment etc. Co. v. Murray*, 215.)

STIPULATIONS. See Appeal and Error, 7.

STOCK.

Capital, defined. See Corporations, 2.

Shares of, defined. See Corporations, 2.

STOCKHOLDERS' SUITS. See Corporations, 4, 5.

SUBROGATION. See Corporations, 1.

SUFFICIENCY.

- Of evidence to sustain parol contract. See Contracts, 1.
- Of pleading. See Appeal and Error, 7.

SUMMONS.

In error, insufficient. See Appeal and Error, 14.

SUPPLEMENTAL FORECLOSURE. See Mortgages, 2, 3.

SURETIES.

1. **SURETIES — CONTRACTS — REFORMATION — INNOCENT PURCHASERS.**—Where sureties upon a bond to secure payment of rent admitted that they signed the bond knowing the contents thereof, and that they permitted it to remain unchanged until after the property and bond were sold to an innocent purchaser, and conceded that under the terms thereof they were liable for the rent to the amount of the bond, they will not be permitted, as against the interests of the purchaser, to have the bond reformed so as to limit their responsibility to guaranteeing the payment of rent to the amount expressed in the bond. (*Stevens v. Wadleigh*, 351.)
- See Office and Officers, 1, 2, 4, 6.

SURPRISE.

Granting continuance because of, discretionary. See Continuance, 1.
See New Trial, 1, 2.

SURRENDER. See Landlord and Tenant, 8, 9, 10, 12.

TAX-DEED. See Taxes and Taxation, 13, 14.

TAXES AND TAXATION.

1. TAXES AND TAXATION—ASSESSMENT—POWER OF BOARD OF EQUALIZATION TO CHANGE—REV. STATS. ARIZ. 1887, PAR. 2654, CONSTRUED.—Under the statute, *supra*, one of the powers of the board of equalization is to add to or deduct from the assessment-roll the valuation of property. (Hampson v. Dysart, 98.)
2. SAME—SAME—SAME—MUST PROCEED IN FORMAL MANNER—NOTICE—TIME AND PLACE OF HEARING—TIME MUST BE REASONABLE—WAIVED BY APPEARANCE.—In the changing of an assessment they must proceed in a formal way, giving notice to the persons interested, naming a day when they will act in the matter, and allowing a reasonable time to appear, but the question whether five days was reasonable or not is waived by the appearance of the party in interest. (Hampson v. Dysart, 98.)
3. SAME—SAME—RAISING—EVIDENCE—APPEAL AND ERROR—REVIEW—RECORD MUST SHOW THAT BOARD ACTED WITHOUT EVIDENCE—OTHERWISE ORDER CONCLUSIVE.—The record must affirmatively show that the board acted without evidence; otherwise, its order in the premises is conclusive that it did act on such evidence as was necessary. (Hampson v. Dysart, 98.)
4. TAXES AND TAXATION—ASSESSMENT—SHARES OF BANK STOCK.—In an assessment which states the names of shareholders, and the correct number of shares owned by each, in a banking corporation, it is evident the intent was not to tax the capital stock, but the shares of stock owned by the individual stockholders. (Western Investment etc. Co. v. Murray, 215.)
5. SAME—SAME—SAME—ALL BANK STOCK ASSESSABLE IN NAME OF BANK MERE IRREGULARITY—LAWS ARIZ. 1897, ACT NO. 51, SECS. 4, 6, CONSTRUED.—Section 4, *supra*, provides that the shares of national bank stock shall be entered and taxed in the names of shareholders; section 6, *supra*, provides that it is the duty of the officer in charge of any banking association to file a sworn statement showing the number and amount of shares of such corporation, the names and residences of the shareholders, and the number and amount of shares owned by each. It is the intent of the act, *supra*, that the shares of all banking associations, as well as national banks, should be listed and assessed in the names of the individual holders thereof, and, under the said statute making it the duty of the officers of the bank to pay the taxes due on such shares and giving the bank a lien to protect it in so doing, while properly shares of bank stock should be listed and assessed in the names of the holders, an assessment in the name of the bank is a mere irregularity, and one which will not warrant the equitable interference of the court. (Western Investment etc. Co. v. Murray, 215.)

TAXES AND TAXATION (Continued).

6. **TAXES AND TAXATION—BANKS—OTHER CORPORATIONS—HOW ASSESSED—DOUBLE TAXATION—LAWS ARIZ. 1897, ACT NO. 51, CONSTRUED AND HELD NOT TO REPEAL REV. STATS. ARIZ. 1887, PARS. 2630, 2633—NOR ARE THEY REPEALED BY LAWS ARIZ. 1893, ACT NO. 85—REV. STATS. U. S. 1878, SEC. 5219, CITED.—**Act No. 51, *supra*, does not contemplate "double taxation," but provides that all corporations, including national banks, which otherwise would be exempt under section 5219, *supra*, shall bear their just burden of taxation; and, in order to effect this purpose, in the case of banks, the shares of stock shall be assessed and taxed, and not the corporate property, while in the case of other corporations the assessment shall be upon the corporate property, and not upon the shares of stock. Thus construed, the act, *supra*, is not in conflict with, neither does it nor Act No. 85, *supra*, repeal, paragraphs 2630 and 2633, *supra*. (Western Investment etc. Co. v. Murray, 215.)
7. **TAXES AND TAXATION—BOND TO SECURE PAYMENT OF TAXES ON PERSONALTY—REV. STATS. ARIZ. 1887, PARS. 680, 2650, CITED.—**A bond to secure the payment of taxes on personal property, given under paragraph 2650, *supra*, though executed to the territory, may be sued on by the county interested in the taxes covered thereby, paragraph 680, *supra*, providing that "every action shall be prosecuted in the name of the real party in interest." (Curry v. County of Gila, 48.)
8. **SAME—SAME—REV. STATS. ARIZ. 1887, PAR. 2650, CONSTRUED—LIABLE FOR TAXES FOR CURRENT YEAR.—**The provision of paragraph 2650, *supra*, that for the purposes of seizure and sale of personal property for taxes the amount to be collected is regulated by the rate of the preceding year, is not intended as a release of the person owning property, and who has suffered a seizure, from payment of taxes established and levied for the current year, and it is the duty of the principal on the bond to pay the amount of taxes assessed against the particular property released as the same appears against him on the duplicate assessment-roll of the current year. (Curry v. County of Gila, 48.)
9. **TAXES AND TAXATION — DOUBLE TAXATION — REVENUE ACT — NOT REPEALED BY ACT NO. 51—**BANKING CO. v. MURRAY, ANTE, P. 215, 56 PAC. 728, APPROVED.—Act No. 51 of the Laws of Arizona of 1897 does not repeal the general provisions of the revenue laws with reference to double taxation, but merely changes, in the case of banks and banking institutions, the manner of taxation, by providing for the assessment and taxation of the shares of stock instead of the property of the bank. *Banking Co. v. Murray, supra*. (National Bank of Arizona v. Long, 311.)
10. **TAXES AND TAXATION—ILLEGAL—EQUITY WILL RELIEVE AGAINST—INJUNCTION.—**The taxation by a city of shares of stock of a national bank is not merely an irregularity, but an attempt to tax

TAXES AND TAXATION (Continued).

property which is exempt from taxation, and therefore presents such a case as equity may relieve against by injunction. (*National Bank of Arizona v. Long*, 311.)

11. **TAXES AND TAXATION—NATIONAL BANKS—PERSONAL PROPERTY—POWER OF CITY TO TAX—REV. STATS. U. S., SEC. 5219, CONSTRUED.**—Personal property of a national bank is not taxable by a city under section 5219, *supra*, providing that shares of stock of a national bank may be taxed in the city where the bank is located at the same rate as other moneyed capital in the hands of individual citizens, if such tax be authorized by any statute of the state or territory where such bank is located. (*National Bank of Arizona v. Long*, 311.)
12. **SAME—SAME—SHARES OF STOCK—MAY BE, BUT ARE NOT REQUIRED TO BE, TAXED BY CITIES—REV. STATS. U. S. SEC. 5219; LAWS OF ARIZONA, 1897, ACT NO. 51; PHOENIX CITY CHARTER CONSTRUED.**—United States statute, *supra*, permits the taxation of shares of stock of national banks, but the legislature must determine and direct the manner, mode, and place of taxing, and taxation is not required in the absence of action by local legislature. Act No. 51, *supra*, providing that counties shall tax the shares of stock of any banks therein, does not apply to cities. The general provision in charter, *supra*, granting the power to levy city taxes upon all real and personal property within the city cannot be construed as directing and determining the manner and place of taxing such shares of stock, or as authorizing their taxation. (*National Bank of Arizona v. Long*, 311.)
13. **TAXES AND TAXATION—TAX-DEED—NOTICE OF INTENTION TO APPLY FOR—LAWS ARIZ. 1893, ACT NO. 84, SEC. 20, CONSTRUED—NEED NOT BE SERVED BY PURCHASER INDIVIDUALLY.**—The statute, *supra*, requiring the purchaser of property sold for delinquent taxes to serve upon the owner written notice of his intention to apply for tax-deed, does not require such notice to be served by the purchaser himself; it is sufficient if legal notice be served. (*Hale v. Hughes*, 255.)
14. **SAME—SAME—EVIDENCE—ADMISSIBILITY—LAWS ARIZ. 1893, ACT NO. 84, SECS. 21, 22, CITED.**—A tax-deed reciting all of the matters prescribed in sections 21 and 22, *supra*, is properly received in evidence, where the record fails to disclose that the recitals were incorrect, or that any effort was made to prove them incorrect. (*Hale v. Hughes*, 255.)

TENANCY.

At will, what constitutes and how terminated. See Landlord and Tenant, 11.

See Ejectment, 1.

TENANCY IN COMMON.

1. **TENANCY IN COMMON—CONVEYANCE OF WHOLE ESTATE BY ONE COTENANT—ENTRY UNDER DEED CLAIMING WHOLE—COLOR OF TITLE—ADVERSE POSSESSION—STATUTE OF LIMITATIONS.**—A conveyance by one cotenant, purporting to convey an estate in severalty, constitutes color of title, and entry, under the deed, claiming an interest coextensive with that with which the deed purports to deal, is an entry under color of title. The cotenants are therefore bound to take notice of the deed and of the entry made under it, and to take such steps as may be required to enforce a recognition of their rights. Should they fail to do so within the time prescribed by the statute of limitations, their rights will be no longer susceptible of enforcement, and their interests, by operation of that statute, will vest in the party in possession under the deed. (*Thompson v. Ferry*, 301.)
2. **SAME—SAME—SAME—SAME—SAME—REV. STATS. ARIZ. 1887, PAR. 2299, CITED.**—Where a patentee of mining ground, whose possession, under color of title, has ever been adverse to his cotenant, sells and conveys the same, and grantees remain in the open, notorious, exclusive, peaceable, and adverse possession thereof for five years prior to the commencement of a suit in equity, by said cotenant, to have the grantees declared trustees for his interest therein and that they be decreed to convey it, is barred by the statute of limitations, *supra*. (*Thompson v. Ferry*, 301.)
3. **SAME—SAME—SAME—SAME—SAME—LACHES.**—In 1883, Collins was cotenant in the Poland Mine. He mortgaged his interest. When the mortgage became due it was foreclosed. The cotenants were made parties, not as cotenants, but it was alleged that they claimed some interest subordinate to plaintiff, which allegation was found true by the decree. All were served and defaulted, and the mine was bought in by the mortgagor under the foreclosure sale. After his death, his administrator conveyed the mine to Dickey, who went into possession, relocated the claims, secured patents thereto, and conveyed them by divers mesne conveyances to defendants. After defendants and their grantors had been in possession for nearly ten years, paying taxes, and expending over thirty thousand dollars in development work, of all of which plaintiff, one of the Collins cotenants, was aware, he brought suit to enforce his interest as such cotenant. Under the equitable doctrine of laches, plaintiff is estopped from now asserting that he is a cotenant, and that defendants are trustees of the title for his use. (*Thompson v. Ferry*, 301.)

TENDER. See Mortgages, 8; Pleading, 2.

TIME.

Essence of contract, when. See Contracts, 2, 3; Landlord and Tenant, 5.

Reasonable. See Contracts, 2.

TITLE.

Suit to quiet. See Mines and Mining, 24.

TRIAL.

1. TRIAL—MOTION TO SET ASIDE JUDGMENT AND FOR NEW TRIAL—POWER OF COURT TO GRANT MOTION DURING TERM WHERE MOTION IS NOT FILED DURING TIME PROVIDED BY STATUTE—REV. STATS. ARIZ. 1887, PAR. 836, CONSTRUED.—Courts possess unlimited power over their own orders and judgments during the term at which rendered, and a court has power during the term to grant a motion to set aside a judgment and grant a new trial, filed three days after the rendition of the judgment, notwithstanding paragraph 836, *supra*, provides that "all motions for new trials, in arrest of judgment or to set aside a judgment, shall be made within two days after the rendition of the verdict or judgment, if the term of court shall continue so long." (*Spicer v. Simma*, 347.)

See Criminal Law, 6, 7, 8, 9; Equity, 7, 8, 9, 13.

TWO THIRDS OF QUALIFIED VOTERS.

Interpreted. See Statutory Construction, 2.

UNCERTAINTY. See Elections, 3; Statutory Construction, 1.

UNIVERSITY OF ARIZONA.

1. UNIVERSITY OF ARIZONA—REGENTS—EMPLOYMENT OF INSTRUCTORS—NOTICE OF DISMISSAL—LAWS ARIZ. 1885, ACT APPROVED MARCH 12, SEC. 11, AS RE-ENACTED AND REVISED BY REV. STATS. ARIZ. 1887, PAR. 2496, CONSTRUED.—Under the statute, *supra*, providing that the board of regents of the University of Arizona shall have the power to remove any officer or employee when in their judgment the interests of the university require it, the board has no power to enter into a contract with an instructor providing that the employment shall be terminated only upon notice for a fixed time, and no action can be maintained by an instructor dismissed without notice for salary during the time of notice provided thereby. (*Devol v. Board of Regents*, 259.)

VARIANCE. See Appeal and Error, 7.

VENDOR'S LIEN.

1. VENDOR'S LIEN—MINES AND MINING—REAL PROPERTY.—Where mining property is conveyed by a deed absolute, and no express lien is reserved for the unpaid portion of the purchase money, there is no implied equitable lien in favor of the vendor for such unpaid purchase price. (*Baker v. Fleming*, 418.)

VENDOR AND VENDEE.

1. VENDOR AND VENDEE—SALES—CONTRACT OF—FORFEITURES OF LAND NOT OWNED BY VENDOR—NOT ENFORCED IN EQUITY—NOT FAVORED

VENDOR AND VENDEE (Continued).

IN LAW.—Real estate cannot be forfeited to another which the other has never owned, and to which he has not title, because of a failure to pay for property which the vendor did own, and to which he did have title. Forfeitures are not enforced in equity and are not favored in law. (Henry v. Mayer, 103.)

VERDICT.

Advisory. See Equity, 13.
Concurrence of nine jurors, when sufficient. See Constitutional Law, 1.
Special. See Equity, 13.
See Equity, 8, 9.

VERIFICATION.

Effect of. See Counties, 2.
Necessity for. See Pleadings, 20.

VOTER.

Qualifications of. See Elections, 1, 2, 3.

WAIVER. See Claim and Delivery, 1; Taxes and Taxation, 2.

WARRANTS. See Counties, 1, 2, 3, 4, 5, 6.

WIFE'S SEPARATE ESTATE.

Liability for husband's debts. See Husband and Wife, 1.

WOMAN'S SUFFRAGE.

Power of legislature to confer. See Elections, 1.

WRIT OF ASSISTANCE.**1. WRIT OF ASSISTANCE—WHEN PROPER—MORTGAGE—FORECLOSURE.—**

The holder of a sheriff's deed for real estate purchased under a decree of foreclosure of a mortgage and a sale of the mortgaged premises has a right to a writ of assistance to procure possession of the premises purchased, as against all persons who were parties to the foreclosure suit, and all who hold under authority given by such parties after the commencement of such suit. (Daggs v. Wilson, 388.)

See Mortgages, 7.

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